Supreme Court, U.S.
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No. _____

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1994

_____

Stephen D. McCullough,

Petitioner

v.

Branch Banking & Trust Company, Inc.,

Respondent

_____

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

_____

PETITION FOR A WRIT OF CERTIORARI

_____

by Stephen D. McCullough, pro se

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110 pp

QUESTION PRESENTED

Whether the Fourth Circuit's decision to apply the limitations period set forth in the North Carolina Handicapped Persons Protection Act, N.C. Gen. Stat. sec. 168A-12, to actions brought in North Carolina alleging violations of the Vocational Rehabilition Act of 1973, as amended, 29 U.S.C. sec. 794, breached the obligation of the courts to apply the limitations periods of state statutes to federal civil rights actions only in a manner that is consistent with the Constitution and laws of the United States.

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Stephen D. McCullough respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A) is reported at 35 F.3d 127. The opinion of the district court dismissing petitioner's claim under sec. 504 of the Rehabilitation Act of 1973 (Appendix B) based upon that court's holding that respondent was not a recipient of federal financial assistance (an issue not addressed by the court of appeals or this petition) is reported at 844 F.Supp. 258. The opinion of the district court finding in petitioner's favor on the statute of limitations issue (Appendix C) is unreported.

JURISDICTION

The court of appeals entered its judgement on September 13, 1994 (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Title 42 U.S.C. sec. 1988 provides in relevant part:

The jurisdiction in civil and criiminal matters conferred on the district courts by the provisions of this Title, and of the Title 'CIVIL RIGHTS,' and of the Title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and

changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, **so far as same is not inconsistent with the Constitution and laws of the United States,** shall be extended to and govern the said courts in the trial and disposition of the cause . . ." (emphasis added).

U.S. Constitution, Amendent 14, sec. 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. **No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;** nor shall any State deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" (emphasis added).

STATEMENT OF THE CASE

A. Background

Petitioner was hired by respondent in June 1986, after he had voluntarily and affirmatively disclosed that he had been fired from his previous investment banking job due to his record of conviction for D.U.I. and hit and run with injury.[1] During the first eighteen months of his employment by respondent, petitioner was arrested several times for D.W.I. All of these arrests took place on petitioner's personal time in his personal automobile while he was not performing any

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[1] Hughes Deposition: page 6, line 13 - page 7, line 12.

responsibility in connection with his employment. The last of these arrests, which took place in petitioner's driveway in December, 1987, resulted in petitioner's (and not respondent's) name being listed in a local, eastern North Carolina newspaper as was the routine practice of that newspaper.[2] That routine listing was observed by a Human Resources officer of respondent, and petitioner's supervisor informed petitioner that further publicity associated with drinking and driving could not recur.[3] As a consequence of

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[2]Hughes Deposition: page 27, line 16 - page 28, line 4

[3]Hughes Deposition: page 28, lines 9 - 20. Hughes Deposition: page 92, lines 14 - 19; page 92, line 23 - page 96, - line 1. Skinner Deposition: page 50, lines 16 - 19.

that arrest and subsequent conviction, petitioner spent five of his vacation days and two weekend days in jail. Petitioner had no further arrests until an October 1990 D.W.I. arrest of which he was eventually acquitted and where he had been found sleeping in his personal automobile on his personal time alongside a rural road outside his home county. That arrest generated no relevant publicity,[4] but in February, 1991, the arresting officer called respondent's human resources department presumably for the purpose of verifying employment and address. While considering what disciplinary action to take against petitioner as a result of that contact, petitioner's supervisors documented his personnel file with a memorandum

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[4]Hughes Deposition: page 68, line 11 - line 21

in which they wrote they "agreed that we had never perceived that alcohol had interferred with (petitioner's) job performance, and that we believed that (petitioner) had always handled the business of the bank with integrity".[5] Petitioner's three full annual performance reviews were all rated "very good",[6] and petitioner did not have to drive in order to discharge his employment responsibilities. On March 1, 1991, petitioner was placed on a leave of absence. Petitioner was subsequently and summarily terminated effective March 13, 1991 after he had recognized his alcoholism and

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[5]Hughes Deposition: page 118, lines 8 -18. Hughes Deposition: page 119, line 25 - page 120, line 5.

[6]Skinner Deposition: page 35, line 17 - page 36, line 23.

specifically stated to his supervisor his clear intent to immediately seek inpatient/residential thirty day counseling in order to overcome his dependence on alcohol.[7]

B. Proceedings Below

After exhausting pre-litigation efforts to settle the dispute between the parties, petitioner filed suit in federal district court on May 28, 1992, 442 days after he was discharged. Jurisdiction was proper in federal district court pursuant to 28 U.S.C. sec. 1331, as this case was brought pursuant to, inter alia, sec. 504 of the Rehabilitation Act of 1973, 29 U.S.C.

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[7]Hughes Deposition: page 57, lines 12 - 25. Hughes Deposition: page 121, line 19 - page 122, line 8. Skinner Deposition: page 123, line 24 - page 124, line 25.

sec. 794. On July 17, 1992, respondent's four attorneys filed a motion which requested, inter alia, dismissal of petitioner's claim under sec. 504 of the Rehabilitation Act of 1973 based upon respondent's position that that claim was "barred by the applicable statute of limitations."[8] On January 15, 1993, the federal district court for the Eastern District of North Carolina, Malcolm J. Howard, issued an order which denied respondent's motion insofar as it sought to dismiss petitioner's Rehabilitation Act claim based upon the statute of limitations (See Appendix C). On September 30, 1993, the same Eastern District of North Carolina court issued a final decision, to be effected January 25, 1994,

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[8]Defendant's Motion to Dismiss dated July 17, 1992.

dismissing petitioner's Rehabilitation Act claim holding that respondent was not a recipient of federal financial assistance and, thus, not amenable to suit pursuant to 29 U.S.C. 794. (See Appendix B). Petitioner appealled this decision to the U.S. Court of Appeals for the Fourth Circuit, and respondent cross-appealled based upon the statute of limitations issue. Appellate jurisdiction was proper pursuant to 28 U.S.C. sec. 1291. On September 13, 1994, the Fourth Circuit issued its decision affirming dismissal of petitioner's Rehabilitation Act claim based only upon the question raised in respondent's cross-appeal regarding the applicable statute of limitations (Appendix A). The court of appeals did not, pursuant to 28 U.S.C. sec. 2403(b), certify to the North Carolina state attorney general the fact that the

constitutionality of N.C. Gen. Stat. sec. 168A-11(c) was drawn into question. This petition constitutes a final appeal of petitioner's Rehabilitation Act claim.

Due to the crowed trial calendar of petitioner's solo practioner counsel up until this point, that counsel is unable to pay proper and timely attention to this petition. It is petitioner's hope and expectation that he can present this petition in a competent and comprehensible fashion pro se, particularly since the decision being appealled is so apparent in its error and import. Furthermore, the issue(s) involved appear(s) well defined.

REASONS FOR GRANTING THE PETITION

I. The Decision of the Court of Appeals is Erroneous and in Distinct Conflict with the Principles in the U.S. Supreme Court's Decision in the case of Wilson

v. Garcia, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d. 254 (1985).

A different panel of the Fourth Circuit had previously noted:

> "The Fifth Circuit ably paraphrased the Wilson Court's test of when to apply a state statute of limitations under section 1988:
>
> 1) follow federal law if federal law provides a limitations period; 2) apply the common law as modified by state constitution or statute, if no limitations period is provided by federal law; 3) but apply state law only if it is not inconsistent with the constitution and laws of

the United States.

Wolsky v. Medical College of Hampton Roads, 1 F.3d 222, 223 at note 2 (4th Cir. 1993), cert. denied, 62 U.S.L.W. 3471, 114 S.Ct. 881, 127 L.Ed. 2d 77 (1994) citing Hickey v. Irving Indep. School Dist., 976 F.2d 980, 982 (5th Cir. 1992).

In the instant case, the Fourth Circuit found that the North Carolina Handicapped Persons Protection Act, N.C. Gen. Stat. secs. 168A-1 to -12 (1987) (see Appendix D) was the North Carolina statute most analogous to the Rehabilitation Act, and they applied the limitations period set forth in N.C. Gen. Stat. sec. 168A-12 to petitioner's Rehabilitation Act claim in affirming dismissal of that action. The Fourth Circuit panel listed petitioner's arguments at pages 7 & 8 of Appendix A which petitioner believes

demonstrate that the Rehabilitation Act is most analogous to the Equal Employment Practices Act, N.C. Gen. Stat. sec. 143-422.2 (See Appendix D), the most important of which is that the Rehabilitation Act avails an injured party of "the full panoply of legal remedies", including compensatory and punitive damages under the reasoning set forth in Franklin v. Gwinett County Public Schools, ___ U.S. ___, 112 S.Ct. 1946, 117 L.Ed.2d 208 and Pandazides v. Virginia Board of Education, 13 F. 3d 823, 830 (4th Cir. 1993). The statute of limitations applicable to the Equal Employment Practices Act is set forth in N.C. Gen. Stat. sec. 1-52(5) (See Appeddix D). Petitioner does not concede his position on this point, but the basis for this appeal is that, even if the North Carolina Handicapped Persons Protection Act is found to be the North

Carolina state statute "most analogous" to the Rehabilitation Act, the application of its statute of limitations to the Rehabilitation Act is inconsistent with the Constitution and laws of the United States. The Fourth Circuit panel who issued the decision being appealed took note that sec. 168A-11(c) of the North Carolina Handicapped Persons Protection Act "provides:

> No court shall have jurisdiction over an action filed under this Chapter where the plaintiff has commenced federal judicial or administrative proceedings under Section 503 or Section 504 of the Vocational Rehabilitation Act of 1973, 29 U.S.C. secs. 793 and 794, as amended, or federal regulations promulgated

> thereunder, involving or arising out of the facts and circumstances involved in the alleged discriminatory practice under this Chapter. If such proceedings are commenced after a civil action has been commenced under this Chapter, the State court's jurisdiction over the civil action shall end and the action shall be forthwith dismissed."

(See Appendix A, pages 5 & 6). The United States Supreme Court in its (7-1) majority holding in Wilson, supra, which serves as binding authority for federal courts through this day, summed up its decision as follows:

> "It was the very ineffectiveness of state remedies that led Congress

to enact the Civil Rights Acts in the first place. Congress therefore intended that the remedy provided in sec. 1983 be independently enforceable whether of not it duplicates a parallel state remedy. Monroe v. Pape, 365 U.S., at 173, 5 L.Ed. 2d 492, 81 S.Ct. 473. The characterization of all sec. 1983 actions as involving claims for personal injuries minimizes the risk that the choice of a state statute of limitations would not fairly serve the federal interests vindicated by Sec. 1983. General personal injury actions, sounding in tort, constitute a major part

> of the total volume of civil litigation in the state courts today, and probably did so in 1871 when sec. 1983 was enacted. It is most unlikely that the period of limitations applicable to such claims ever was, or ever would be, fixed in a way that would discriminate against federal claims, or be inconsistent with federal law in any respect."

Wilson, at 278 & 279, 1948 & 1949.

Respondent's attorneys are highly skilled and experienced advocates. But even O.J. Simpson's attorneys would not be able to craft an effective argument that applying the statute of limitations found at N.C. Gen. Stat. 168A-12 to actions brought pursuant to 29 U.S.C.

794 in North Carolina renders such a claim under the Rehabilitation Act 'independently enforceable whether or not it duplicates a parallel state remedy' or that applying that limitations period would not 'discriminate against federal claims' given the forfeiture provisions of N.C. Gen. Stat. sec. 168A-11(c) noted above. There is no sensible reason that the Wilson court would have distinguished between claims brought under the Rehabilitation Act and claims brought pursuant to sec. 1983 for the purpose of borrowing state statutes of limitation, since 42 U.S.C. sec. 1988 pertains to "the provisions of . . . Title 'CIVIL RIGHTS".

The Fourth Circuit noted that "McCullough argues that the shorter limitations period under the North Carolina (Handicapped Persons Protection) Act is inconsistent with federal

policies". They then observe that "the Civil Rights Act of 1991, 42 U.S.C.A. sec. 2000e-5(e)(1) (West Supp. 1994) and the Americans with Disabilities Act, 42 U.S.C.A. sec. 12117(a) (West Supp. 1994) require claimants to file a charge with the Equal Employment Opportunity Commission (EEOC) within 180 days of the alleged unlawful employment practice, unless within that period the claimant had initially instituted proceedings with a state or local agency . . . " (See Appendix A, page 6). And they ultimately hold that "application of the 180-day statute of limitations is not inconsistent with the federal policies behind the Rehabilitation Act" (See Appendix A, page 7). However, they specifically ignore and/or omit consideration in their opinion of petitioner's chief argument in brief;

"The appellee contends that N.C. Gen. Stat. sec. 168A-11(c) is an expression of the North Carolina legislature's intent to force an aggrieved person to choose between the pursuit of his/her rights under either the North Carolina (Handicapped Persons Protection) Act or 29 U.S.C. sec. 794. If appellee's interpretation of the effect and intent of N.C. Gen. Stat. sec. 168A-11(c) is correct, and this Court adopts the 180 (-day) statute of limitation under the North Carolina Act for 29 U.S.C. sec. 794, the North Carolina legislature will have succeeded in the

> effective imposition of a penalty against any person who desires to exercise that person's rights under the North Carolina Act by requiring that person to forfeit their rights under 29 U.S.C. sec. 794 in favor of their rights under the North Carolina Act",[9]

and at oral argument that application of the statute of limitations enacted in N.C. Gen. Stat. sec. 168A-12 "discriminated" against the federal right in "violation of the Fourteenth Amendment" of the United States Constitution. There has been no review of this panel's decision since the district court found in favor of petitioner's position on this question

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[9]Appellant's Reply Brief, page 9

(See Appendix C).

In its published opinion, the Fourth Circuit took note that N.C. Gen. Stat. sec. 168A-11(c) "(makes) it impossible for a claimant to recover for the same discrimination in both state and federal court" (See Appendix A, page 6). Yet they held that the statute of limitations found in N.C. Gen. Stat. sec 168A-12 was applicable to sec. 504 of the Rehabilitation Act in spite of their specifically stated awareness that significant differences exist between the rights vindicated by the North Carolina Handicapped Persons Protection Act and those promulgated pursuant to the Rehabilitation Act and that there are substantial differences in the legal process involved in establishing those rights. At oral argument, the Senior Circuit Judge of the panel emphatically

stated that this panel's decision was controlled by the previous Fourth Circuit holding in Wolsky v. Medical College of Hampton Roads, 1 F.3d 222 (4th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 881, 127 L.Ed. 2d 77 (1994) under the legal doctrine of stare decisis. This statement is possibly indicative of an important departure from the proper course of judicial deliberations.

> "Although the need for national uniformity 'has not been held to warrant the displacement of state statutes of limitations for civil rights actions,' Board of Regents v. Tomanio, 446 U.S. at 489, 64 L.Ed.2d at 440, 100 S.Ct. 1790, uniformity **within each State** is entirely consistent with the borrowing principle

contained in sec. 1988. Wilson at 275, 1946 (emphasis added).

If the courts are going to deviate from applying the limitations periods of state personal injury statutes to federal civil rights actions, then it may be entirely appropriate to borrow limitations periods from state statutes the essential nature of which varies from state to state. Since the Virginia Rights of Persons with Disabilities Act, Va. Code Ann. secs. 51.5-40 et seq., from which the limitations period was borrowed in Wolsky, supra does not contain a forfeiture provision similar to that found in N.C. Gen. Stat. sec. 168A-11(c), that is what should have been done in the case at bar. It is unjust for a court to borrow a limitations period from a state statute which forces a citizen to forfeit either

a state or a federal civil right, especially when those rights are not identical and when unsettled questions of statutory construction require litigation, for example, on issues such as standing.

When a court applies the limitations period of a state statute to a federal civil right, it breaches the court's obligation to act in a manner that is consistent with the Constitution and laws of the United States if the application of that limitations period effectively requires a citizen to forfeit either his federal civil right or his rights under the state statute from which the limitations period is borrowed. The fact that the state statute from which the limitations period is borrowed contains a provision which may, itself, be in violation of the U.S. Constitution,

N.C. Gen. Stat. sec. 168A-11(c) in this instance, does not relieve the courts from establishing a limitations period in compliance with federal law and Amendment XIV, sec. 1 of the U.S. Constitution. The U.S. Supreme Court in its Wilson decision emphasized "the predominance of the federal interest":

> "State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies".

Wilson, at 269, 1943 and at note 18, citing Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 367, 97 S.Ct.

2447, 53 L.Ed.2d 402 (1977). Since 28 U.S.C. sec. 2403(b) may be applicable, a copy of this petition has been served upon the attorney general of the state of North Carolina concurrent with the filing of this appeal. But in this case, the Fourth Circuit clearly failed to meet its obligation to establish a limitations period for actions brought pursuant to sec. 504 of the Rehabilitation Act, 29 U.S.C. sec. 794, in North Carolina in a manner consistent with the Constitution and laws of the United States, and the supervisory power of the United States Supreme Court must be invoked in order to correct this distinct and important error.

II. The Circuit Courts of Appeal are in Ostensible Conflict

The Fourth Circuit remarks in its opinion;

> "We are aware that other courts have concluded that claims under the Rehabilitation Act are best characterized as ones for personal injury and have, therefore, applied the state personal injury statute of limitations. See Baker v. Board of Regents, 991 F.2d 628, 632 (10th Cir. 1993); Bush v. Commonwealth Edison Co., 990 F.2d 928, 933 (7th Cir. 1993), cert. denied, 114 S.Ct. 1648 (1994); Hickey v. Irving Indep. Sch. Dist., 976 F.2d 980, 983 (5th Cir. 1992);

Morse v. University of Vermont, 973 F.2d 122, 127 (2d Cir. 1992); Hall v. Knott County Bd. of Educ., 941 F.2d 402, 407-08 (6th Cir. 1991), cert. denied, 112 S.Ct. 982 (1992).

(See Appendix A, page 4.) All the other Circuits undoubtedly took note of the virtues of applying state personal injury limitation periods to federal civil rights actions espoused by the Wilson court. Also, The "Supreme Court has recognized that claims for discrimination are essentially claims for personal injury", Hickey, supra at 983 citing Goodman v. Lukens Steel Co., 482 U.S. 656, 661. But the Fourth Circuit found that their decision is distinguishable from the cases cited "in that either no state counterpart to the Rehabilitation Act existed, or the state

counterpart lacked a statute of limitations" (Appendix A, page 5). What makes the Fourth Circuit's holding in this case intolerable is that it cannot be squared with Amendment XIV, sec. 1 of the U.S. Constitution. The lower courts require guidance from the U.S. Supreme Court as to under what circumstances they may depart from applying state personal injury limitation periods to federal civil rights actions.

III. The Case is Important

The Circuit Courts of Appeal are in conflict on the question of whether to borrow state personal injury statutes of limitation for all federal Rehabilitation Act claims, or the proper criteria by which to evaluate the applicability of various state statutory limitation periods to the Rehabilitation Act. But what makes this case

sufficiently compelling to warrant review by this Court is the question of whether the limitations period for any state statute may be applied to a federal civil right in such a manner as to require a citizen to substantially forfeit either the federal civil right or his rights under the state statute from which the limitations period is borrowed. As the Supreme Court observed in its Wilson decision, the circumstance of federal civil rights statutes being enacted without a limitations period is "a void which is commonplace in federal statutory law." Wilson at 266, 1942 citing Board of Regents v. Tomanio, 466 U.S. 478, 483, 100 S.Ct. 1790, 1794, 64 L.Ed. 2d 440 (1980). Notably, a recently enacted federal civil rights statute, the Americans with Disabilities Act, 42 U.S.C.S. 12111 et. seq., is yet another federal civil right passed

while silent in regard to a limitations period. The Wilson case, decided in 1985, "principally involved the second step in the (42 U.S.C. sec. 1988) process (of applying state common, constitutional and statutory law to the rules of decision relevant to federal civil rights): the selection of 'the most appropriate' or 'the most analogous' state statute of limitations to apply to (a federal civil right) this sec. 1983 claim." Wilson at 268, 1942. The instant case gives this Court an opportunity to specifically address the third and final step of the process and to firmly establish the predominance of the federal interest. If the Fourth Circuit's decision in this case is allowed to stand, courts throughout the United States will be provided with authority to apply state statutes of limitation to federal civil rights

actions without regard to whether or not their decision discriminates against the federal right. Accordingly, a review of the Fourth Circuit's holding in this case by this, the highest and most honorable Court in the land, is of great import to citizens throughout all the fifty states.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully Submitted,

Stephen D. McCullough

Pro Se Petitioner

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

STEPHEN D. McCULLOUGH,
Plaintiff-Appellant,

v.

BRANCH BANKING & TRUST COMPANY,
Defendant-Appellee.

No. 94-1235

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
Malcolm J. Howard, District Judge.
(CA-92-374-5-H)

Argued: July 19, 1994

Decided: September 13, 1994

Before WILKINSON and WILLIAMS, Circuit Judges, and
SHEDD, United States District Judge for
the District of South Carolina, sitting by designation.

Affirmed by published opinion. Judge Williams wrote the opinion, in which Judge Wilkinson and Judge Shedd joined.

COUNSEL

ARGUED: Robert James Willis, Raleigh, North Carolina, for Appellant. Edward Katze, CONSTANGY, BROOKS & SMITH, Atlanta, Georgia, for Appellee.

OPINION

WILLIAMS, Circuit Judge:

Stephen D. McCullough brought this suit against Branch Banking and Trust Company (BB&T), claiming that he was terminated because of his handicap as a recovering alcoholic, in violation of § 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. § 794 (West 1985 & Supp. 1994). BB&T filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) based on the statute of limitations, and to strike the requests for punitive and compensatory damages. The district court denied the motion to dismiss, holding that the action was not barred by the statute of limitations, but granted BB&T's motion to strike the requests for compensatory and punitive damages. BB&T next moved for summary judgment, arguing that it did not receive federal funds for the purposes of the Rehabilitation Act. The district court granted BB&T's motion for summary judgment on that ground.[1]

Both BB&T and McCullough appeal the respective determinations by the lower court. BB&T challenges the denial of its motion to dismiss on statute of limitation grounds, and McCullough challenges the grant of BB&T's motion to strike and motion for summary judgment. Agreeing with BB&T's argument, we hold that the district court erred in applying the North Carolina personal injury statute of limitations. We therefore affirm the district court's dismissal of McCullough's claim on this alternate ground, and find it unnecessary to resolve the remaining issues in this case.

I.

McCullough began working with BB&T in 1986, after he was fired from his previous employer, First Union Bank. That termination followed an automobile accident in which McCullough was convicted of

[1] In the opinion granting BB&T's motion for summary judgment, the district court also declined to exercise supplemental jurisdiction over McCullough's state law claims, and dismissed those claims without prejudice. *See* 28 U.S.C.A. § 1367 (West 1993). McCullough has not appealed that decision.

hit and run with injury and driving under the influence of alcohol, and was sentenced to two years in jail.

McCullough's pattern of drinking and driving continued during his employment with BB&T. He was arrested at least four times for driving under the influence, and spent seven days in jail as a result of one of the arrests. Although he attempted to conceal these incidents from BB&T, BB&T learned about one arrest when a fellow employee read about it in the newspaper. BB&T claims that after they learned about this arrest, they asked McCullough to receive counseling and told him that further incidents of alcohol abuse would not be tolerated. According to BB&T, McCullough's subsequent alcohol-related arrests and lies to conceal his troubles caused BB&T to place McCullough on involuntary leave without pay, and then to terminate his employment, effective March 12, 1991.

On May 28, 1992, McCullough filed this lawsuit, alleging discriminatory discharge based on his alcoholism in violation of § 504 of the Rehabilitation Act. BB&T, in its ensuing motion to dismiss argued that, because the Rehabilitation Act has no statute of limitations, the district court must apply the most analogous state statute of limitations, which it believed was the North Carolina Handicapped Persons Protection Act, N.C. Gen. Stat. §§ 168A-1 to -12 (1987) (the North Carolina Act), which has a 180-day statute of limitations. N.C. Gen. Stat. § 168A-12. The district court rejected this argument, holding that the state personal injury statute, which has a limitations period of three years, was most analogous. *See* N.C. Gen. Stat. § 1-52(5) (1983). Because McCullough filed his cause of action less than three years from the date of his termination, the court held that the action was timely filed.

On appeal, BB&T argues that this court's decision in *Wolsky v. Medical College of Hampton Rds.*, 1 F.3d 222 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 881 (1994), requires application of the statute of limitations found in the North Carolina Act. The issue of the applicable state statute of limitations is a question of law to be reviewed *de novo*. *See Meekins v. United Transp. Union*, 946 F.2d 1054, 1057 (4th Cir. 1991) (citing *Parker v. Prudential Ins. Co.*, 900 F.2d 772, 776 (4th Cir. 1990)).

II.

The Rehabilitation Act, like many civil rights statutes, does not contain a specific limitations period. In such situations, Congress has directed the courts to select the most appropriate state statute of limitations to apply to the federal cause of action. 42 U.S.C.A. § 1988(a) (West Supp. 1994). "When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so." *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985). This process involves a two part analysis. In choosing the applicable statute, the court should first select the state statute "most analogous" to the federal claim. *Id.* at 268. *See also Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660 (1987). The court should then consider whether application of that limitations period is consistent with the federal statute and its underlying policies. *Wilson*, 471 U.S. at 266-68.

Our first inquiry, therefore, is to determine which North Carolina statute is most analogous to a Rehabilitation Act claim. We are aware that other courts have concluded that claims under the Rehabilitation Act are best characterized as ones for personal injury and have, therefore, applied the state personal injury statute of limitations. *See Baker v. Board of Regents*, 991 F.2d 628, 632 (10th Cir. 1993); *Bush v. Commonwealth Edison Co.*, 990 F.2d 928, 933 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1648 (1994); *Hickey v. Irving Indep. Sch. Dist.*, 976 F.2d 980, 983 (5th Cir. 1992); *Morse v. University of Vermont*, 973 F.2d 122, 127 (2d Cir. 1992); *Hall v. Knott County Bd. of Educ.*, 941 F.2d 402, 407-08 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 982 (1992).

This court, however, recently held that state personal injury statutes are not always the most analogous to Rehabilitation Act cases. In *Wolsky*, 1 F.3d at 224, we held that when a state has enacted a counterpart to the Rehabilitation Act, the statute of limitations of the state counterpart and not the personal injury statute was most analogous and therefore, the most appropriate limitations period. *Wolsky* involved a Rehabilitation Act claim arising in Virginia. Virginia has its own act protecting disabled individuals, the Virginia Rights of Persons with Disabilities Act, Va. Code Ann. §§ 51.5-40 to -46 (1991 & Supp. 1994) (the Virginia Act). Because the Virginia Act was enacted

with the same legislative purpose as the Rehabilitation Act, namely the protection against and redress for employment discrimination based on a person's handicap or disability, and reflected that purpose by tracking the language of the Rehabilitation Act and providing for similar protections, we determined that the Virginia Act was the most analogous statute, and applied its one-year statute of limitations. *See Wolsky* at 224. In *Wolsky*, we expressly declined to follow the decisions of other courts that had applied the personal injury statute of limitations to Rehabilitation Act cases, finding those cases distinguishable in that either no state counterpart to the Rehabilitation Act existed, or the state counterpart lacked a statute of limitations. *Id.* at 224-25.

Here, like Virginia, North Carolina has an act which protects disabled individuals from discrimination. The North Carolina Act was enacted with the purpose

> to encourage and enable all handicapped people to participate fully to the maximum extent of their abilities in the social and economic life of the State, to engage in remunerative employment, to use available public accommodations and public services, and to otherwise pursue their rights and privileges as inhabitants of this State.

N.C. Gen. Stat. § 168A-2. Similar to the Rehabilitation Act and the Virginia Act, the North Carolina Act specifically addresses employment discrimination on the basis of handicap or disability. N.C. Gen. Stat. § 168A-5. The North Carolina Act also prohibits such discrimination in public accommodations, service, and transportation. N.C. Gen. Stat. § 168A-6 to -8. Although the language of the North Carolina Act does not correspond to the Rehabilitation Act as precisely as the language of the Virginia Act, the North Carolina Act provides similar protections to disabled individuals.

Furthermore, the North Carolina legislature's intent to create a counterpart to the Rehabilitation Act is evidenced by § 168A-11(c) of the North Carolina Act, which provides:

> No court shall have jurisdiction over an action filed under this Chapter where the plaintiff has commenced federal judi-

> cial or administrative proceedings under Section 503 or Section 504 of the Vocational Rehabilitation Act of 1973, 29 U.S.C. §§ 793 and 794, as amended, or federal regulations promulgated thereunder, involving or arising out of the facts and circumstances involved in the alleged discriminatory practice under this Chapter. If such proceedings are commenced after a civil action has been commenced under this Chapter, the State court's jurisdiction over the civil action shall end and the action shall be forthwith dismissed.

In this section, the North Carolina Act specifically prohibits concurrent jurisdiction under it and the Rehabilitation Act, making it impossible for a claimant to recover for the same discrimination in both state and federal court. This section further supports the position that the North Carolina Act was intended as a state counterpart to the Rehabilitation Act, because clearly, if the North Carolina Act had been intended to cover claims different from those under the Rehabilitation Act, the North Carolina legislature would not have barred recovery under both Acts. We therefore agree with BB&T that, pursuant to our precedent in *Wolsky*, the North Carolina Act is the most analogous statute to the Rehabilitation Act.

We now consider whether application of the 180-day statute of limitations contained within the North Carolina Act is consistent with the federal policies underlying the Rehabilitation Act. *Wilson*, 471 U.S. at 266-67. The Virginia limitations period approved in *Wolsky* was one year, and McCullough argues that the shorter limitations period under the North Carolina Act is inconsistent with federal policies. However, a short statute of limitations is not uncommon among federal civil rights statutes, and it serves the goals of prompt notification to the employer and swift resolution of the conflict. For example, both the Civil Rights Act of 1991, 42 U.S.C.A. § 2000e-5(e)(1) (West Supp. 1994), and the Americans with Disabilities Act (ADA), 42 U.S.C.A. § 12117(a) (West Supp. 1994), require claimants to file a charge with the Equal Employment Opportunity Commission (EEOC) within 180 days of the alleged unlawful employment practice, unless within that period the claimant had initially instituted proceedings with a state or local agency, in which case the charge must be filed with the EEOC within 300 days. When the plaintiff fails to file such a complaint in a timely fashion with the EEOC, the claim is time-

barred in federal court. *Butts v. New York Dep't of Hous. Preservation & Dev.*, 990 F.2d 1397, 1401 (2d Cir. 1993). This filing requirement acts as a 180-day statute of limitations for many plaintiffs seeking relief under either the Civil Rights Act of 1991 or the ADA. *See Jarrell v. United States Postal Serv.*, 753 F.2d 1088, 1091 (D.C. Cir. 1985) (holding that the EEOC filing requirements "are not jurisdictional prerequisites to suit, but are more 'like a statute of limitations'") (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982)).

The federal policies behind the ADA and the Rehabilitation Act are similar, since both statutes were enacted, at least in part, to help disabled persons find and maintain employment. *Compare* 29 U.S.C.A. § 701(b)(2) (West Supp. 1994) (one of the purposes of the Rehabilitation Act is "to ensure that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities . . . and in assisting States and providers of services in fulfilling the aspirations of such individuals with disabilities for meaningful and gainful employment") *with* 42 U.S.C.A. § 12101(b)(1) (West Supp. 1994) (an objective of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"). We consider it unlikely that Congress, while enacting a 180-day time-bar for an ADA claim, would not approve of the same limitations period under the Rehabilitation Act. Accordingly, we hold that application of the 180-day statute of limitations is not inconsistent with the federal policies behind the Rehabilitation Act.

McCullough, however, has identified several distinctions between the North Carolina Act and the Virginia Act, and argues that, pursuant to *Wolsky*, these disparities discount the analogies between the North Carolina Act and the Rehabilitation Act and dictate against applying the limitations period of the North Carolina Act. He argues that his claim is more analogous to a general wrongful discharge cause of action, *see* N.C. Gen. Stat. § 143-422.2 (1993), which for statute of limitations purposes is treated as a personal injury claim with a three-year limitations period. N.C. Gen. Stat. § 1-52(5).

McCullough cites the following distinctions between the North Carolina Act and the Virginia Act applied in *Wolsky*: 1) the North

Carolina Act only provides for a bench trial, while the Virginia Act and the Rehabilitation Act allow jury trials; 2) the North Carolina Act only allows awards of injunctive relief and back pay, but the Virginia and Rehabilitation Acts provide for full compensatory and punitive damages; 3) the North Carolina Act, unlike the Virginia and Rehabilitation Acts, does not extend or base its coverage upon receipt of any state assistance; (4) the North Carolina Act requires the disabled person to apprise the employer, employment agency, labor organization, or place of public accommodation of his or her handicapping condition, make suggestions for possible accommodations, and cooperate in any evaluations of possible accommodations, which is not specifically required by the Virginia and the Rehabilitation Acts; and (5) the North Carolina Act, unlike the Virginia Act, does not specifically require that the scope of the Act's protection be defined in a way that is consistent with the regulations imposed under the Rehabilitation Act.

This argument, however, begs the question of which North Carolina statute is most analogous to the Rehabilitation Act. The differences between the North Carolina Act and the Rehabilitation Act identified by McCullough do not, by themselves, magically tip the balance of similarities so as to make the general wrongful discharge provision more analogous to the Rehabilitation Act than the specific provisions of the North Carolina Act. It simply means that, in North Carolina, there is no perfect counterpart to the Rehabilitation Act, and we must determine which statute is more appropriate. To make this determination, we must look at both statutes in their entirety to ascertain which North Carolina law is most similar to the cause of action provided under the Rehabilitation Act. For example, in *Wilson*, 471 U.S. at 272-75, the Court considered the underlying causes of action created by 42 U.S.C. § 1983 (1988) and determined that, because such a broad variety of claims could be asserted under § 1983, it was more analogous to a general cause of action. Since all § 1983 actions involve alleged injuries to the personal civil rights of the claimants, the Court concluded that the cause of action can best be characterized as one for personal injury. *Id.* at 277-78. In *Wolsky*, 1 F.3d at 223, we reasoned that the Rehabilitation Act was not a general provision such as § 1983, but a more specifically tailored statute intended to redress discrimination against a defined class of individuals. We therefore concluded that the underlying cause of action of the Rehabilitation

Act was more similar to the specific provisions of the Virginia Act, which also redressed discrimination against disabled individuals, than it was to the general personal injury provisions under Virginia law. *Id.* at 224. We also held in *Wolsky* that, although there were differences between the Virginia and the Rehabilitation Acts, "the distinctions between the two statutes [were] not significant enough to decline applying the statute of limitations as set forth in the Virginia Act." *Id.* at 225.

Here, both the North Carolina Act and the Rehabilitation Act redress discrimination against the same very specific group of persons. In contrast, the general wrongful discharge statute protects against a wide range of discrimination which, although including persons with disabilities, also encompasses many other classes of individuals. N.C. Gen. Stat. § 143-422.2. Based on our decision in *Wolsky*, we conclude that, because the Rehabilitation Act is a specific statute directed at protecting one class of persons, the specific North Carolina Act is more analogous to McCullough's claim than a general wrongful discharge statute. "It is a basic principle of statutory construction that when two statutes are in conflict, a specific statute closely applicable to the substance of the controversy at hand controls over a more generalized provision." *Farmer v. Employment Sec. Comm'n*, 4 F.3d 1274, 1284 (4th Cir. 1993).[2] Accordingly, we reject McCullough's argument.

III.

For the aforementioned reasons, we conclude that the North Caro-

[2]By way of further illustration, we point to an analogous situation under North Carolina law. A North Carolina cause of action predicated "[u]pon a contract, obligation or liability arising out of a contract, express or implied," is subject to a three-year limitations period. N.C. Gen. Stat. § 1-52(1) (1983 & Supp. 1993). However, when such a cause of action is targeted against a local unit of government, the general three-year limitations period gives way to a specific two-year limitations period provision created for such a contingency. N.C. Gen. Stat. § 1-53(1) (1983). It follows that, when faced with a conflict between a general provision and a specific provision, the specific provision controls.

lina Act is the most analogous statute, and its 180-day limitations period should have been applied to McCullough's claim. Because McCullough filed his complaint more than a year after his termination, his lawsuit should have been dismissed as untimely. We therefore affirm the district court's dismissal of McCullough's claim on this alternate ground.

AFFIRMED

APPENDIX B

THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NORTH CAROLINA

RALEIGH DIVISION

No. 92-374-CIV-5-H

FILED

SEP 30 1993

DAVID W. DANIEL,

CLERK

U.S. DIST. COURT

E. DIST. NO. CAR.

STEPHEN D. McCULLOUGH,

Plaintiff,

v.

BRANCH BANKING AND TRUST COMPANY, INCORPORATED,

Defendant

ORDER

This matter is before the court on defendant's motion for summary judgement pursuant to Federal Rule of Civil Procedure 56(b). In a Memorandum and Recommendation ("M&R") filed on July 20, 1993, United States Magistrate Judge Charles K. McCotter, Jr., recommended that the court grant the motion on all three of the plaintiff's remaining claims. The parties have filed

objections, responses, and replies to the M&R, and the matter is ripe for disposition.

STATEMENT OF THE FACTS

A summary of the facts is provided in the M&R at pages one to three. Briefly restated, "(t)he plaintiff is and has been an alcoholic since at least college." Pl.'s Mem. of Law in Opp'n to Def.'s Mot. for Summ. J. at 7. He is a former employee of the defendant who was discharged on March 13, 1991. Defendant contends that the plaintiff was discharged because of his "continued alcohol-related misconduct and his pattern of lying to his superiors about the ramifications of that conduct." Def.'s Br. in Supp. of Mot. for Summ. J. at 25. Plaintiff contends that the discharge violated both federal and state law, in part because the discharge

constituted discrimination against him on the basis of a handicap, recovering alcoholism.

DISCUSSION OF THE LAW

As noted by the Magistrate Judge, the court must rule on three specific claims. One arises under federal law; two arise under state law. The federal claim alleges that the defendant discriminated against the plaintiff on the basis of a handicap, recovering alcoholism, in violation of sec. 504 of the Rehabilitation Act of 1973 ("the Act"), as amended.[1]

The first state claim is that the defendant wrongfully discharged the plaintiff in violation of the public policy reflected in N.C.G.S. sec. 143-

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[1]Section 504 is codified at 29 U.S.C. sec. 794.

422.2, a statute declaring that North Carolina public policy forbids employment discrimination against handicapped persons. The second state claim is that the defendant wrongfully withheld a bonus from the plaintiff in violation of the North Carolina Wage and Hour Act, N.C.G.S. secs. 95-25.1 - 95-25.25.

I. Plaintiff's Federal Rehabilitation Act Claim

The Magistrate Judge recommended that the court grant summary judgement to the defendant on the plaintiff's federal Rehabilitation Act claim after finding that the defendant was not bound by the provisions of the Act. By its express language, sec. 504 of the Act applies to all programs and activities which receive Federal financial assistance. Defendant participates in a guaranteed loan program sponsored by

the federal Small Business Administration ("SBA"),[2] but the Magistrate Judge found that the loan program did not qualify as federal financial assistance.[3]

After a thorough review of the facts and the law, the court finds that the Magistrate Judge's conclusion is proper in all respects. The court has reviewed the plaintiff's objections and recognizes that this issue of statutory construction is unsettled. See Moore v. Sun Bank, 923 F.2d 1423 (11th Cir. 1991) (2 - 1 split decision holding that the term

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[2]The statutory authorization for the guaranted loan program is found at 15 U.S.C. sec. 636(a).

[3]After reviewing the record, the court finds that the parties apparently agree that the defendant receives no other aid which may qualify as federal financial assistance.

"Federal financial assistance " as used in the Act includes the SBA's guaranteed loan program). However, the court is persuaded that the Magistrate Judge reached a proper decision. The court's conclusion rests on an independent analysis of the Magistrate Judge's discussion of the Rehabilitation Act, including its legislative history, administrative regulations,[4] and related statutes.[5]

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[4]The court notes that "(t)he application of the Rehabilitation Act . . . is illuminated by its implementing regulations." Little v. Fed. Bureau of Investigation, --- F.3d ---, 1993 WL 300836. *3 (4th Cir. August 10, 1993).

[5]The court notes that this result is also consistent with the court's view of the relative importance of the state and federal interests included

Accordingly, the court will grant summary judgement to the defendant on the plaintiff's claim under the Rehabilitation Act.

II. Plaintiff's State Claims

According to the complaint, the court has jurisdiction over the plaintiff's two state claims because "those claims . . . are so related to the plaintiff's claim under (the federal Rehabilitation Act) that (they) form part of the same case or controversy under Article III of the United States Constitution."

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in the present action. The court is unwilling to invoke federal jurisdiction by allowing the anchor rope of this case to be put down in federal court based on the slim string of SBA loans. The court is convinced that such an anchor would not long hold.

Compl., paragraph 4, at 2.

The language of the plaintiff's complaint mirrors the language of the federal supplemental jurisdiction statute, 28 U.S.C. sec. 1367(a):

> (I)n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

The court finds that the plaintiff's state claims fall within the court's supplemental jurisdiction. The court

agrees that the state claims are so closely related to the federal claim that they form part of the same case or controversy.

However, the court notes that under 28 U.S.C. sec. 1367(c)(3), "(t)he district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if - the district court has dismissed all claims over which it has original jurisdiction." See Rhyne v. Henderson County, 973 F.2d 386, 395 (5th Cir. 1992) ("The district court properly dismissed all of the federal questions that gave it original jurisdiction in this case. Therefore, we find that the district court's dismissal of the state claims was proper under 28 U.S.C. sec. 1367(c)(3).").

The court finds that sec. 1367(c)(3) applies to the present case, because the court has dismissed the only claim

within its original jurisdiction, the plainfiff's federal Rehabilitation Act claim. The court further finds that the word "may" in sec. 1367(c)(3) requires the court to exercise its discretion in deciding whether to retain supplemental jurisdiction over the plaintiff's state claims. See Noble v. White, 996 F.2d 797, 799 (5th Cir. 1993) ("District courts enjoy wide discretion in determining whether to retain supplemental jurisdiction over a state claim once all federal claims are dismissed.").

The supplemental jurisdiction statute does not list the factors which guide the court's discretion under sec. 1367(c)(3). However, the court finds that its supplemental jurisdiction over the state claims is analogous to the former doctrine of pendent jurisdiction. See Parker & Parsley Petroleum Co. v.

Dresser Ind., 972 F.2d 580, 584 n.5 (5th Cir. 1992) ("What was formerly called 'pendent jurisdiction' is now included within the term 'supplemental jurisdiction.'"). As a result, the court finds that its exercise of discretion under sec. 1367(C)(3) may properly be guided by the principles which guided the exercise of judicial discretion under the doctrine of pendent jurisdiction.

One of these principles was described by the United States Court of Appeals for the Fourth Circuit in a 1991 decision.

> "It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies of considerations of judicial

economy, convenience and fairness to litigants; if these are not present, a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them. . . . Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though insubstantial in a jurisdictional sense, the state claims should be dismissed as well."

In re Conklin, 946 F2d. 306, 322 (4th

Cir. 1991), quoting United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) (footnotes omitted). To be sure, Gibbs, as quoted in Conklin, "d(id) not establish a mandatory rule to be applied inflexibly in all cases." Carnegie-Mellon Univ v. Cohill, 484 U.S. 343, 350 n.7 (1988). However,

> in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine - judicial economy, convenience, fairness and comity - will point toward declining to exercise jurisdiction over the remaining state-law claims.

Id. Accordingly, the court finds that it must analyze considerations of

judicial economy, convenience, fairness, and comity in deciding whether to dismiss the plaintiff's state claims under sec. 1367(c)(3). The court further finds that it must apply these factors carefully to the present action, which has been substantially developed through discovery and other trial preparation in this court.

The court finds that considerations of comity counsel dismissal of the plaintiff's state claims.

> The federal courts are courts of limited jurisdiction . . . and often are not as well equipped for determinations of state law as are state courts. Aside from the state courts' superior familiarity with their respective jurisdictions' law, the

federal courts' construction of state law can be "uncertain and ephemeral." Parker, 972 F. 2d at 588-89 (citations omitted). Plaintiff's state claims present complex and unsettled issues of North Carolina law which would be more appropriately resolved by a North Carolina court. The issues include 1) the proper definition of "handicapped person" under N.C.G.S. sec. 143-422.2, part of the North Carolina Equal Employment Practices Act; and 2) the proper analysis of the North Carolina Wage and Hour Act, N.C.G.S. sec. 95-25.1 - 95-25.25, with its accompanying administrative regulations in the North Carolina Administrative Code, in the context of the plaintiff's claim for an unpaid bonus. As a result, the court is convinced that "the interests of federalism and comity point strongly

toward dismissal." Parker, 972 F.2d at 589.[6]

The court also finds that dismissal of the state claims would not unduly inconvenience the parties. After such a dismissal,

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[6] See also id. at 589, n.9 ("The framers of the Constitution did not contemplate that a federal trial court could assume jurisdiction over exclusively state-law claims in the absence of diversity jurisdiction. Alexander Hamilton, for example, states that the judicial power of the United States ought to extend only

> 1st, to all those which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation; 2nd, to

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(1)ittle new legal research would be necessary, as the surviving claims (would be) governed by state law, and any additional factual research (would have) to be conducted anyway. . . . Additionally, the most expensive element of the trial preparation, discovery, (would be)

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all those which concern the execution of the provisions expressly contained in the articles of the Union; 3rd, to all those in which the United States are a party; 4th, to all those which involve the PEACE of the CONFEDERACY, whether they relate to the

largely usable in the state proceeding.

Id. at 587-88. The court finds that the greatest inconvenience likely to be suffered by the parties upon dismissal would be the inconvenience of filing

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> intercourse between the United States and foreign nations or to that between the States themselves; 5th, to all those which originate on the high seas, and are of admiralty or maritime jurisdiction; and lastly, to all those in which the State tribunals cannot be supposed to be impartial and unbiased.

The Federalist No. 80, at 475 (Alexander Hamilton) (Clinton Rossiter ed., 1961).").

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the present case in state court, along with the motion for summary judgement on the state claims. The court further finds that such inconvenience is not "undue".

Moreover, the court finds that the general considerations of fairness support dismissal. "The fairness factor concerns the prejudice to the parties that would arise from dismissal." Id. at 588. The court is convinced that neither party would suffer undue prejudice by litigating the plaintiff's state claims in state court. Also, the court notes specifically that, under North Carolina law, "filing an action in federal court which is based on substanitive state law . . . toll(s) the statute of limitations while that action is pending." Clark v. Velsicol Chem. Corp.. --- N.C. App. ---, 431 S.E. 2d 227, 229 (1993). As a result,

if the plaintiff's state claims were timely filed in federal court, the plaintiff will be able to refile the claims in state court.

Finally, the court finds that considerations of judicial economy also lean in favor of dismissing the plaintiff's state claims. The claims have been developed and narrowed in federal court and, as a result, they will be in a posture to be readily resolved in state court. The court further finds that judicial economy would not be served by allowing the plaintiff to plead state claims into federal court on the strength of a baseless federal claim. See Parker, 972 F.2d. at 587 ("Nor would it serve judicial economy to reward a plaintiff by allowing it into federal court when it pleads a baseless RICO suit.").

In sum, the court finds that it ought

to exercise its discretion to dismiss the plaintiff's supplemental state claims under 28 U.S.C. sec. 1367(c)(3). the court recognizes that dismissal will create a degree of inconvenience to the parties, but the court finds that the inconvenience is not undue and that it is outweighed by considerations of comity, fairness, and judicial economy.

III. Dismissal Procedure

For the reasons described above, the court will grant summary judgement to the defendant on the plaintiff's Rehabilitation Act claim. In addition, for the reasons described above, the court will dismiss the plaintiff's state claims without prejudice so that they may be refiled in state court. However, to ensure that the plaintiff is not barred by the relevant statute of limitations from filing the state claims

in state court, the court will stay the present action as to the state claims until January 3, 1994. The stay will enable the plaintiff to file a state action while the current action is still pending. See Clark, 431 S.E.2d at 229 ("(t)he statute of limitations is tolled when (the federal) suit is properly instituted, and it stays tolled as long as the (federal) action is alive").

After January 3, the court will dismiss the state claims without prejudice. If he so desires, the plaintiff may appeal this court's decisions to the United States Court of Appeals for the Fourth Circuit after the state claims are dismissed.[7]

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[7]The court notes that it does not intend the grant of summary judgement on the plaintiff's federal Rehabilitation Act claim to qualify as entry of a

The court notes that it will also deny the plaintiff's three pending trial-related motions: the motion for the court to take judicial notice of certain present worth tables and computation systems (#58 on the docket sheet), the motion in limine for exclusion of any evidence or information from the defendant on certain issues (#60 on the docket sheet), and the motion to allow designation of the plaintiff's expert on monetary damages (#62 on the docket sheet). The court will deny these motions because all of the plaintiff's claims will be dismissed before a trial occurs.

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partial final judgement under Fed. R. Civ. P. 54(b).

CONCLUSION

For the aforementioned reasons, it is hereby ORDERED that the defendant's motion for summary judgement on the plaintiff's claim under the federal Rehabilitation Act of 1973 is GRANTED.

It is further ORDERED that this case is hereby STAYED as to the plaintiff's two state claims until January 3, 1994. The clerk is directed to return the case file to the court for further action on January 4, 1994.

It is further ORDERED that the plaintiff's motion for the court to take judicial notice of certain present worth tables and computation systems (#58 on the docket sheet), the plaintiff's motion in limine for exclusion of any evidence or information from the defendant on certain issues (#60 on the docket sheet), and the plaintiff's motion to allow designation

of the plaintiff's expert on monetary damages (#62 on the docket sheet) are hereby DENIED.

This the 29th day of September, 1993.

MALCOLM J. HOWARD

United States District Judge

At Greenville, NC

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APPENDIX C

THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NORTH CAROLINA

RALEIGH DIVISION

No. 92-374-CIV-5-H **FILED**

JAN 15 1993

STEPHEN D. McCULLOUGH, **U.S. DIST. COURT**

Plaintiff, **E. DIST. NO. CAR.**

v. **ORDER**

BRANCH BANKING AND TRUST COMPANY, INCORPORATED,

Defendant

This matter is before the court on the motions of defendant Branch Banking and Trust Co., Inc., ("BB&T") to dismiss plaintiff's first claim for relief and portions of plaintiff's second claim for relief and to strike subsections (i) and (j) from section X of plaintiff's complaint. The Honorable Charles K. McCotter, Jr., United States Magistrate Judge, entered a Memorandum and

Recommendation on December 3, 1992, recommending that the defendant's motions be granted. The plaintiff filed timely objections to the Magistrate Judge's recommendations that the first claim for relief be dismissed and that the motion to strike be granted. The plaintiff did not object to the Magistrate Judge's recommendation that portions of his second claim for relief, alleging bad faith discharge and breach of a unilateral employment contract, be dismissed. After a full briefing on the motions and the plaintiff's objections to the Magistrate Judge's Memorandum and Recommendation, this matter is now ripe for ruling.

Plaintiff, a former employee of BB&T, filed this action on May 28, 1992, alleging that he was wrongfully discharged from employment on March 12, 1991, based upon his handicap as

a recovering alcoholic. The plaintiff's first claim for relief seeks redress pursuant to sec. 504 of the Rehabilitation Act of 1973, 29 U.S.C. sec. 794. The second claim for relief, a state law claim for wrongful discharge, alleges that the plaintiff was discharged in bad faith, in violation of the public policy of the State of North Carolina as set forth in N.C. Gen. Stat. sec. 143-143.2, and in breach of an employment contract.

Motion to Dismiss Sec. 504 Claim

BB&T moved to dismiss the plaintiff's sec. 504 claim as a matter of law on the grounds that it was barred by the applicable statute of limitations. Plaintiff filed his complaint in this action on May 28, 1992, 443 days after the date of his termination. BB&T contends, and the Magistrate Judge found, that sec. 504 claims are governed by

the 180-day statute of limitations applicable to claims under the North Carolina Handicapped Persons Protection Act ("the North Carolina Act"), N.C. Gen Stat. sec. 168A-12. In contrast, the plaintiff argues that the three-year statute of limitations applicable to claims for personal injury, N.C. Gen. Stat. sec. 1-52(5), applies to claims under the Rehabilitation Act.

The Rehabilitation Act does not contain a statute of limitations applicable to sec. 504 claims. Where a federal statute fails to provide a specific statute of limitations, the court must adopt the most appropriate or analagous state statute of limitations. See Goodman v. Lukens Steel Co., 482 U.S. 656, 660 (1987); Wilson v. Garcia, 471 U.S. 261, 266-67 (1985). In so doing, the court must examine the various statutes of limitations

under North Carolina law and determine which statute would be most appropriate to apply to the plaintiff's sec. 504 claim. Federal law determines the characterization of a federal claim for statute of limitations purposes. Id; see also Wolsky v. Eastern Virginia Medical Auth., 795 F. Supp. 171, 174 (E.D. Va. 1992).

The Magistrate Judge found no case law applying a North Carolina statute of limitations to a sec. 504 claim nor any directive from the Fourth Circuit or the Supreme Court concerning which specific statute of limitations to apply to a sec. 504 claim. However, the Magistrate Judge applied the reasoning of Eastman v. Virginia Polytechnic Inst. & State Univ., 732 F. Supp. 665 (W.D. Va. 1990), aff'd on other grounds, 939 F. 2d 204 (4th Cir. 1991), and concluded that the North Carolina Act was the

North Carolina statute most analagous to sec. 504. Adopting the 180-day statute of limitations applicable to claims under the North Carolina Act, the Magistrate Judge found that the plaintiff's sec. 504 claim was untimely and recommended that it be dismissed.

The plaintiff objects to this recommendation. The plaintiff contends that the Magistrate Judge erred in focusing on the specific employment discrimination aspects of the plaintiff's claim instead of on the general underlying federal interest in providing redress for all forms of discrimination. The plaintiff buttresses his argument before this court with supplemental authority which apparently was not submitted to the Magistrate Judge. The plaintiff cites Wolsky, in which the district court held that "a claim under the Rehabilitation Act in Virginia is

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best characterized for statute of limitations purposes as a claim for an injury to a person." 795 F. Supp. at 174. The court in Wolsky rejected the argument, similiar to the one asserted by BB&T, that the Virginia Rights of Persons with Disabilities Act was most analagous to the Rehabilitation Act for statute of limitations purposes.

The Rehabilitation Act, which broadly proscribes any form of discrimination against handicapped persons by recipients of federal financial assistance, is patterned after Title VI of the Civil Rights Act. See School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987). Because Title VI does not provide a statute of limitations, courts have applied the statute of limitations used in sec. 1981 and sec. 1983 actions to actions under to Title VI. See Chambers

v. Omaha Public School Dist., 536 F.2d 222 (8th Cir. 1976). The Supreme Court characterizes claims of discrimination under 42 U.S.C. secs. 1981 and 1983 as claims for personal injury. See Goodman, 482 U.S. at 661; Wilson, 471 U.S. at 276. As the district court found in Wolsky:

> (t)he primary object of both Title VI and Rehabilitation Act claims, like sec. 1981 and sec. 1983 claims, is to compensate a party for the injury he has suffered due to discrimination. When viewed in this light, there is no rational reason for distinguishing between Title VI and Rehabilitation Act claims and action (sic) for an injury to a person

for limitations purposes.

Wolsky, 795 F. Supp. at 174.

Applying this characterization of an action under sec. 504, the court finds that a claim under sec. 504 of the Rehabilitation Act in North Carolina is most analagous to a claim for personal injury. Accordingly, the court adopts N.C. Gen. Stat. sec. 1-52(5), the North Carolina statute of limitations applicable to claims to personal injury, as the federal statute of limitations applicable to sec. 504 claims.

North Carolina provides a three-year statute of limitations for personal injury claims. N.C. Gen. Stat. sec. 1-52(5). Because the plaintiff filed this action less than three years from the date of his termination, the court finds that this action was timely filed and is not barred by the statute of limitations. Accordingly, the defendant's

motion to dismiss on the basis of the statute of limitations is DENIED.

Motion to Strike Requests for Punitive and Compensatory Damages

BB&T moves to strike subsections (i) and (j) of section X of the complaint insofar as they request compensatory and punitive damages under sec. 504. Following Fourth Circuit precedent, the Magistrate Judge found that compensatory and punitive damages are not available under sec. 504 and recommended that BB&T's motion be granted.

The plaintiff contends that the Fourth Circuit's ruling in Eastman v. Virginia Polytechnic Inst. & State Univ., 939 F.2d 204 (4th Cir. 1991), that compensatory and punitive damages were not available under sec. 504, was implicitly overruled by the Supreme Court's decision in Franklin v. Gwinnett

County Public Schools, 112 S.Ct. 1028 (1992). In Franklin, the Court considered the types of damages available to a private plaintiff in an action under Title IX. The Court stated that "absent clear direction from Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." Id. at 1035.

As the Magistrate Judge found, the Fourth Circuit's holding in Eastman is consistent with the Supreme Court's instruction in Franklin. In Eastman, the court examined congressional intent and determined that Congress did intend to limit the remedies available under Title VI and sec. 504. Thus, the Fourth Circuit's holding that "sec. 504 of the Rehabilitation Act does not permit an award of compensatory damages" or punitive damages, 939 F.2d at 208-09,

remains unscathed by the Supreme Court's decision in Franklin.

In light of Eastman, the court finds that compensatory and punitive damages are not available under sec. 504. Accordingly, the court adopts the recommendations of the Magistrate Judge and GRANTS the defendant's motion to strike subsections (i) and (j) of section X of the complaint insofar as they request compensatory damages under sec. 504.

CONCLUSION

For the reasons so stated, the court hereby DENIES the defendant's motion to dismiss the plaintiff's first claim for relief under sec. 504 of the Rehabilitation Act. Upon a careful review of the record and the Memorandum and Recommendation of the Magistrate Judge, the court hereby ADOPTS the remaining portions of the Magistrate Judge's

Memorandum and Recommendation, excluding the ruling on the defendant's motion to dismiss the plaintiff's first claim for relief, as its own. Acordingly, the court hereby GRANTS the defendant's motion to dismiss pursuant Fed. R. Civ. P. 12(b)(6) the portions of the plaintiff's second claim for relief based upon bad faith discharge and breach of a unilateral employment contract and DISMISSES these portions of the plaintiff's second claim for relief. Lastly, the court hereby GRANTS the defendant's motion to strike the plaintiff's request for compensatory and punitive damages under sec. 504 and ORDERS that subsections (i) and (j) of section X of the complaint be striken insofar as they request compensatory and punitive damages under sec. 504.

This the 14th day of January, 1993.

MALCOLM J. HOWARD

United States Magistrate Judge

At Greenville, North Carolina

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APPENDIX D

Plaintiffs, who had been awaiting administrative decisions for considerable time, were not required to exhaust administrative remedies prior to maintaining actions under section 793 of this title. California Paralyzed Veterans Ass'n v. F.C.C., D.C.Cal.1980, 496 F.Supp. 125, affirmed 721 F.2d 667, certiorari denied 105 S.Ct. 121, 83 L.Ed.2d 63.

Handicapped employee, an epileptic, and Epilepsy Foundation of America were not required to exhaust their administrative remedies under this section before bringing employment discrimination action against employee's employer. Chaplin v. Consolidated Edison Co. of New York, Inc., D.C.N.Y. 1980, 482 F.Supp. 1165.

11. Persons entitled to maintain action

Employee who was discharged because of his epilepsy lacked standing to sue employer for wrongful dismissal in violation of this section as a third-party beneficiary of contract which was entered into between his employer and federal government and which incorporated an affirmative action provision in favor of physically disabled workers, because allowing the employee to sue as third-party beneficiary was not appropriate to effectuate the intention of the parties. Davis v. United Air Lines, Inc., D.C.N.Y.1983, 575 F.Supp. 677.

Nonprofit corporation dedicated to preserving rights of the handicapped, which alleged that television network had engaged in acts, policies, practices and procedures which discriminated against qualified handicapped persons including members of its association, had standing to sue under this section. California Paralyzed Veterans Ass'n v. F.C.C., D.C.Cal.1980, 496 F.Supp. 125, affirmed 721 F.2d 667, certiorari denied 105 S.Ct. 121, 83 L.Ed.2d 63.

Epilepsy Foundation of America had standing to bring action along with handicapped employee against employee's employer for employment discrimination where the complaint stated an injury to members of the Foundation. Chaplin v. Consolidated Edison Co. of New York, Inc., D.C.N.Y.1980, 482 F.Supp. 1165.

12. Complaint

Visually impaired employees failed to state cause of action for deprivation of a right against state agency and its officials for alleged employment discrimination violative of this section, in light of fact that only deprivation of which employees could have complained would have been a hypothetical situation in which executive personnel of state agency interfered in some way with their right to file a complaint and there was no allegation that any of the personnel interfered in any way with employees' right to file a complaint. Brown v. Sibley, C.A.Miss.1981, 650 F.2d 760.

Where handicapped individuals's action against railroad under this section was dismissed in view of fact that no private right of action exists under this section, handicapped individual's state claims would be dismissed as well, without prejudice, even though federal claim was not insubstantial. Miller v. Union Pacific R. Co., D.C.Neb.1982, 539 F.Supp. 134.

13. Presumptions

On appeal from judgments of dismissal for failure to state a claim, the court of appeals would assume that, as alleged in the complaints, each of the plaintiffs was a qualified handicapped person and each was discharged because of handicaps. Rogers v. Frito-Lay, Inc., C.A.Tex.1980, 611 F.2d 1074, certiorari denied 101 S.Ct. 246, 449 U.S. 889, 66 L.Ed.2d 115.

14. Questions for court

In suits presenting question whether this section impliedly authorizes handicapped individuals who believe that federal contractors have discriminated against them to file civil actions to obtain damages for such discrimination, obligation of federal court was to determine, to the best of its ability, whether Congress intended to create such private right of action; even if the court was satisfied that some factors supported implying such a right, it could not do so if it was unconvinced that Congress intended such a remedy. Rogers v. Frito-Lay, Inc., C.A.Tex.1980, 611 F.2d 1074, certiorari denied 101 S.Ct. 246, 449 U.S. 889, 66 L.Ed.2d 115.

§ 794. Nondiscrimination under Federal grants and programs; promulgation of rules and regulations

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be

subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(Pub.L. 93–112, Title V, § 504, Sept. 26, 1973, 87 Stat. 394; Pub.L. 95–602, Title I, §§ 119, 122(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987.)

Historical Note

References in Text. The amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, referred to in text, mean the amendments made by Pub.L. 95–602. See 1978 Amendments note below.

1978 Amendment. Pub.L. 95–602 substituted "section 706(7) of this title" for "section 706(6) of this title" and inserted provision prohibiting discrimination under any program or activity conducted by any Executive agency or by the United States Postal Service and requiring the heads of these agencies to promulgate regulations prohibiting discrimination.

Construction of Prohibition against Discrimination under Federal Grants with Child Abuse Amendments of 1984. Rights or protections of this section not affected by any provision of Pub.L. 98–457, see section 127 of Pub.L. 98–457, set out as a note under section 5101 of Title 42, The Public Health and Welfare.

Coordination of Implementation and Enforcement of Provisions. For provisions relating to the coordination of implementation and enforcement of the provisions of this section by the Attorney General, see section 1–201 of Ex.Ord.No.12250, Nov. 2, 1980, 45 F.R. 72995, set out as a note under section 2000d–1 of Title 42, The Public Health and Welfare.

Legislative History. For legislative history and purpose of Pub.L. 93–112, see 1973 U.S. Code Cong. and Adm.News, p. 2076. See, also, Pub.L. 95–602, 1978 U.S.Code Cong. and Adm.News, p. 7312.

EXECUTIVE ORDER NO. 11914

Ex.Ord.No.11914, Apr. 28, 1976, 41 F.R. 17871, which related to nondiscrimination in federally assisted programs, was revoked by Ex.Ord.No.12250, Nov. 2, 1980, 45 F.R. 72995, set out as a note under section 2000d–1 of Title 42, The Public Health and Welfare.

Cross References

Alcoholic or drug abuser as not included in term "handicapped individual" for purposes of this section, see section 706 of this title.

Comprehensive rehabilitation centers, information and technical assistance to local governmental units and private nonprofit entities, see section 775 of this title.

Construction, reconstruction, and renovation of academic facilities, financial assistance if primary purpose of assistance is to enable institutions to bring facilities into conformity with this section, see section 1132a of Title 20, Education.

Educational facilities operated by Bureau of Indian Affairs to be brought into compliance with this section, see section 2005 of Title 25, Indians.

Employment of personal assistants for handicapped employees, see section 3102 of Title 5, Government Organization and Employees.

Planning and design of mass transportation facilities to meet special needs of elderly and handicapped, promulgation of regulations, see section 1612 of Title 49, Transportation.

Programs and activities considered to be programs and activities receiving Federal financial assistance for purpose of applying prohibition against discrimination based on handicap—

leged that they were injured by defendant's intentionally deceptive express representation that defendant would provide counsel for them and since this representation was allegedly made irrespective of barred products liability claims. Brown v. Lumbermens Mut. Cas. Co., 90 N.C. App. 464, 369 S.E.2d 367, cert. denied, 323 N.C. 363, 373 S.E.2d 541 (1988).

Claims Arising Out of Disease. — This section, insofar as it constitutes a statute of repose, has no application to claims arising out of a disease. Silver v. Johns-Manville Corp., 789 F.2d 1078 (4th Cir. 1986).

This section did not bar plaintiff's claim for damages for asbestosis, even though the product alleged to have given rise to the injury was purchased more than six years prior to the alleged onset of the disease. Hyer v. Pittsburgh Corning Corp., 790 F.2d 30 (4th Cir. 1986).

Disease is not included within a statute of repose directed at personal injury claims unless the legislature expressly expands the statute's language to include it. Gardner v. Asbestos Corp., 634 F. Supp. 609 (W.D.N.C. 1986).

Where injury or death is alleged to have resulted from disease, the six-year statute of repose under this section is inapplicable. Guy v. E.I. DuPont de Nemours & Co., 792 F.2d 457 (4th Cir. 1986).

Asbestos-Related Claims. — Subdivision (6) does not bar action for wrongful death resulting from exposure to asbestos products brought pursuant to diversity jurisdiction. Burnette v. Nicolet, Inc., 818 F.2d 1098 (4th Cir. 1986).

Action Held Precluded. — Where date of initial purchase of Volkswagen bus whose lack of crashworthiness plaintiff alleged caused him serious personal injuries in an accident on March 24, 1983, was on or about September 4, 1974, by its clear language, the North Carolina statute of repose, subdivision (6) of this section, precluded plaintiff's action. Davidson v. Volkswagenwerk, 78 N.C. App. 193, 336 S.E.2d 714 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 892 (1986).

§ 1-51. Five years.

Cross References. — As to limitation period for unknown and certain other claims against a dissolved corporation, see § 55-14-07.

Editor's Note. — Section 55-14-07 provides, inter alia, that unknown and certain other claims against a dissolved corporation must be commenced within five years after the publication date of the corporation's newspaper notice of dissolution.

Legal Periodicals. — For comment, "Taking Without Compensation: Measure of Permanent Damages Modified by Application of Limitation of Actions for Trespass," see 20 Wake Forest L. Rev. 671 (1984).

§ 1-52. Three years.

Within three years an action —

(1) Upon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding sections or in G.S. 1-53(1).

(2) Upon a liability created by statute, either state or federal, unless some other time is mentioned in the statute creating it.

(3) For trespass upon real property. When the trespass is a continuing one, the action shall be commenced within three years from the original trespass, and not thereafter.

(4) For taking, detaining, converting or injuring any goods or chattels, including action for their specific recovery.

(5) For criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated.

(6) Against the sureties of any executor, administrator, collector or guardian on the official bond of their principal; within three years after the breach thereof complained of.

(7) Against bail; within three years after judgment against the principal; but bail may discharge himself by a surrender of the principal, at any time before final judgment against the bail.

(8) For fees due to a clerk, sheriff or other officer, by the judgment of a court; within three years from the rendition of the judgment, or the issuing of the last execution thereon.

(9) For relief on the ground of fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

(10) Repealed by Session Laws 1977, c. 886, s. 1.

(11) For the recovery of any amount under and by virtue of the provisions of the Fair Labor Standards Act of 1938 and amendments thereto, said act being an act of Congress.

(12) Upon a claim for loss covered by an insurance policy which is subject to the three-year limitation contained in lines 158 through 161 of the Standard Fire Insurance Policy for North Carolina, G.S. 58-44-15(c).

(13) Against a public officer, for a trespass, under color of his office.

(14) An action under Chapter 75B of the General Statutes, the action in regard to a continuing violation accrues at the time of the latest violation.

(15) For the recovery of taxes paid as provided in G.S. 105-267 and G.S. 105-381.

(16) Unless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action, except in causes of actions referred to in G.S. 1-15(c), shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

(17) Against a public utility, electric or telephone membership corporation, or a municipality for damages or for compensation for right-of-way or use of any lands for a utility service line or lines to serve one or more customers or members unless an inverse condemnation action or proceeding is commenced within three years after the utility service line has been constructed or by October 1, 1984, whichever is later.

(18) Against any registered land surveyor as defined in G.S. 89C-3(9) or any person acting under his supervision and control for physical damage or economic or monetary loss due to negligence or a deficiency in the performance of surveying or platting as defined in G.S. 1-50(7). (C.C.P., s. 34; Code, s. 155; 1889, cc. 218, 269; 1895, c. 165; 1899, c. 15, s. 71; 1901, c. 558, s. 23; Rev., s. 395; 1913, c. 147, s. 4; C.S., s. 441; 1945, c. 785; 1971, c. 939, s. 1; 1975, c. 252, ss. 2, 4; 1977, c. 886, s. 1; c. 916, s. 2; c. 946, s. 4; 1979, c. 654, s. 3; 1981, c. 702; c. 777, s. 4; 1991, c. 268, s. 1.)

ARTICLE 49.

North Carolina Human Relations Commission.

§§ 143-416 through 143-422: Repealed by Session Laws 1975, c. 879, s. 36.

Cross References. — For present provisions as to the North Carolina Human Relations Commission, see §§ 143B-391 and 143B-392.

ARTICLE 49A.

Equal Employment Practices.

§ 143-422.1. Short title.

This Article shall be known and may be cited as the Equal Employment Practices Act. (1977, c. 726, s. 1.)

Legal Periodicals. — For survey of 1977 law on employment regulation, see 56 N.C.L. Rev. 854 (1978).

For article, "North Carolina Employment Law After *Coman*: Reaffirming Basic Rights in the Workplace," see 24 Wake Forest L. Rev. 905 (1989).

For note, "Coman v. Thomas Manufacturing Co.: Recognizing a Public Policy Exception to the At-Will Employment Doctrine," see 68 N.C.L. Rev. 1178 (1990).

CASE NOTES

This Article does not prohibit discrimination within the meaning of 29 U.S.C. § 633(b). It merely declares that such discrimination is against the "public policy" of North Carolina. Spagnuolo v. Whirlpool Corp., 467 F. Supp. 364 (W.D.N.C. 1979).

There is no North Carolina statute analogous to Title VII. Harrison v. Edison Bros. Apparel Stores, 924 F.2d 530 (4th Cir. 1991).

Plaintiff in Federal Age Discrimination Suit Need Not Seek Relief from Human Relations Council (now Commission) as Jurisdictional Prerequisite. — Recourse by a plaintiff to the North Carolina Human Relations Council (now Commission) is not a jurisdictional prerequisite to filing a suit in federal court under the Age Discrimination in Employment Act, 29 U.S.C §§ 201 through 219, since this Article is not "a law prohibiting discrimination in employment because of age" and the Council (now Commission) is not a "state authority established or authorized to grant or seek relief from such discriminatory practice" within the meaning of 29 U.S.C. § 633(b). Spagnuolo v. Whirlpool Corp., 467 F. Supp. 364 (W.D.N.C. 1979).

§ 143-422.2. Legislative declaration.

It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees.

It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment foments domestic strife and unrest, deprives the State of the fullest utilization of its capacities for advancement and development, and substan-

tially and adversely affects the interests of employees, employers, and the public in general. (1977, c. 726, s. 1.)

Legal Periodicals. — For survey of 1977 law on employment regulation, see 56 N.C.L. Rev. 854 (1978).

For article discussing evidentiary standards in employment discrimination suits in light of Department of Cor. v. Gibson, 308 N.C. 131, 301 S.E.2d 78 (1983), see 6 Campbell L. Rev. 163 (1984).

For article, "North Carolina Employment Law After *Coman*: Reaffirming Basic Rights in the Workplace," see 24 Wake Forest L. Rev. 905 (1989).

CASE NOTES

The ultimate purpose of § 126-36, this section, and Title VII (42 U.S.C. 2000e et seq.) **is the same;** that is, the elimination of discriminatory practices in employment. North Carolina Dep't of Cor. v. Gibson, 308 N.C. 131, 301 S.E.2d 78 (1983).

North Carolina Supreme Court looks to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases. North Carolina Dep't of Cor. v. Gibson, 308 N.C. 131, 301 S.E.2d 78 (1983).

For discussion of standards applicable to Title VII cases (42 U.S.C. 2000e et seq.) as promulgated by United States Supreme Court and adopted by North Carolina Supreme Court (insofar as they do not conflict with State statute and case law), see North Carolina Dep't of Cor. v. Gibson, 308 N.C. 131, 301 S.E.2d 78 (1983).

Use of Title VII Evidentiary Standards. — Given the similarity of the language of this section and Title VII of the Civil Rights Act of 1964, and the underlying policy of these statutes, it is appropriate for the commission to use Title VII evidentiary standards in an employment discrimination case. North Carolina Dep't of Cor. v. Gibson, 54 N.C. App. 241, 293 S.E.2d 664 (1982), rev'd on other grounds, 308 N.C. 131, 301 S.E.2d 78 (1982).

No Cause of Action for Wrongful Discharge. — In enacting the Equal Employment Practices Act, the North Carolina legislature chose not to provide any remedies beyond those available under federal discrimination statutes. It is unlikely that the North Carolina Courts would disturb this legislative decision by providing a common law remedy for wrongful discharge beyond the procedure envisioned by Title VII. Percell v. IBM, Inc., 765 F. Supp. 297 (E.D.N.C. 1991).

Sexual Harassment. — A complaint alleging that an employer sexually harassed an employee by conditioning continued employment on having sex stated a claim for wrongful discharge under the public policy exception to employment at will. Harrison v. Edison Bros. Apparel Stores, 924 F.2d 530 (4th Cir. 1991).

Employee's allegations that she was terminated because of her opposition to what she believed in good faith to be a number of sexually discriminatory employment practices by employer did not implicate the public policy concerns expressed in this section. Leach v. Northern Telecom, Inc., 141 F.R.D. 420 (E.D.N.C. 1991).

Two Tests Applicable to Employment Decisions Based on Inherently Subjective Criteria. — When reviewing hiring and promotion decisions based on exercise of personal judgment or application of inherently subjective criteria, court may employ either "disparate treatment" test or "disparate impact" test, or both. North Carolina Dep't of Cor. v. Hodge, 99 N.C. App. 602, 394 S.E.2d 285 (1990).

Disparate Treatment Test. — When employee alleges that employer treated him or her in particular less favorably than other employees, employee raises claim of "disparate treatment." North Carolina Dep't of Cor. v. Hodge, 99 N.C. App. 602, 394 S.E.2d 285 (1990).

According to "disparate treatment" analysis, employee has initial burden of proving, by preponderance of evidence, prima facie case of discrimination. [1] He applied for and was qualified for an available position, [2] he was rejected, and [3] after he was rejected, employer filled position with white employee. Once employee establishes prima facie case, inference of discrimination arises. To rebut this inference, employer must present evidence that employee was rejected, or other applicant was chosen, for

Chapter 168A.

Handicapped Persons Protection Act.

Sec.
168A-1. Title.
168A-2. Statement of purpose.
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168A-8. Discrimination in public transportation.
168A-9. Affirmative defenses.
168A-10. Retaliation prohibited.
168A-11. Civil action.
168A-12. Statute of limitations.

§ 168A-1. Title.

This Chapter may be cited as the North Carolina Handicapped Persons Protection Act. (1985, c. 571, s. 1.)

Legal Periodicals. — For note on employment discrimination against the handicapped, see 16 Wake Forest L. Rev. 836 (1980).

§ 168A-2. Statement of purpose.

(a) The purpose of this Chapter is to encourage and enable all handicapped people to participate fully to the maximum extent of their abilities in the social and economic life of the State, to engage in remunerative employment, to use available public accommodations and public services, and to otherwise pursue their rights and privileges as inhabitants of this State.

(b) The General Assembly finds that: the practice of discrimination based upon a handicapping condition is contrary to the public interest and to the principles of freedom and equality of opportunity; the practice of discrimination on the basis of a handicapping condition threatens the rights and proper privileges of the inhabitants of this State; and such discrimination results in a failure to realize the productive capacity of individuals to their fullest extent. (1985, c. 571, s. 1.)

§ 168A-3. Definitions.

As used in this Chapter, unless the context otherwise requires, the term:

(1) "Discriminatory practice" means any practice prohibited by this Chapter.

(2) "Employer" means any person employing 15 or more full-time employees within the State, but excluding a person whose only employees are hired to work as domestic or farm workers at that person's home or farm.

(3) "Employment agency" means a person regularly undertaking with or without compensation to procure for employees opportunities to work for an employer and includes an agent of such a person.

(4) "Handicapped person" means any person who (i) has a physical or mental impairment which substantially limits

one or more major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment. As used in this subdivision, the term:

a. "Physical or mental impairment" means (i) any physiological disorder or abnormal condition, cosmetic disfigurement, or anatomical loss, caused by bodily injury, birth defect or illness, affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or (ii) any mental disorder, such as mental retardation, organic brain syndrome, mental illness, specific learning disabilities, and other developmental disabilities, but (iii) excludes (A) sexual preferences; (B) active alcoholism or drug addiction or abuse; and (C) any disorder, condition or disfigurement which is temporary in nature leaving no residual impairment.

b. "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, and learning.

c. "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits major life activities.

d. "Is regarded as having an impairment" means (i) has a physical or mental impairment that does not substantially limit major life activities but that is treated as constituting such a limitation; (ii) has a physical or mental impairment that substantially limits major life activities because of the attitudes of others; or (iii) has none of the impairments defined in paragraph a. of this subdivision but is treated as having such an impairment.

(5) "Handicapping condition" means any condition or characteristic that renders a person a handicapped person.

(6) "Labor organization" means an organization of any kind, an agency or employee representation committee, a group association, or a plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment.

(7) "Person" includes any individual, partnership, association, corporation, labor organization, legal representative, trustee, receiver, and the State and its departments, agencies, and political subdivisions.

(8) "Place of public accommodations" includes, but is not limited to, any place, facility, store, other establishment, hotel, or motel, which supplies goods or services on the premises to the public or which solicits or accepts the patronage or trade of any person.

(9) "Qualified handicapped person" means:

a. With regard to employment, a handicapped person who can satisfactorily perform the duties of the job in question, with or without reasonable accommodation, (i)

provided that the handicapped person shall not be held to standards of performance different from other employees similarly employed, and (ii) further provided that the handicapping condition does not create an unreasonable risk to the safety or health of the handicapped person, other employees, the employer's customers, or the public;

b. With regard to places of public accommodation a handicapped person who can benefit from the goods or services provided by the place of public accommodation; and

c. With regard to public services and public transportation a handicapped person who meets prerequisites for participation that are uniformly applied to all participants, such as income or residence, and that do not have the effect of discriminating against the handicapped.

(10) "Reasonable accommodations" means:

a. With regard to employment, making reasonable physical changes in the workplace, including, but not limited to, making facilities accessible, modifying equipment and providing mechanical aids to assist in operating equipment, or making reasonable changes in the duties of the job in question that would accommodate the known handicapping conditions of the handicapped person seeking the job in question by enabling him or her to satisfactorily perform the duties of that job; provided that "reasonable accommodation" does not require that an employer:

1. Hire one or more employees, other than the handicapped person, for the purpose, in whole or in part, of enabling the handicapped person to be employed; or
2. Reassign duties of the job in question to other employees without assigning to the handicapped employee duties that would compensate for those reassigned; or
3. Reassign duties of the job in question to one or more other employees where such reassignment would increase the skill, effort or responsibility required of such other employee or employees from that required prior to the change in duties; or
4. Alter, modify, change or deviate from bona fide seniority policies or practices; or
5. Provide accommodations of a personal nature, including, but not limited to, eyeglasses, hearing aids, or prostheses, except under the same terms and conditions as such items are provided to the employer's employees generally; or
6. Make physical changes to accommodate a handicapped person where:
   I. For a new employee the cost of such changes would exceed five percent (5%) of the annual salary or annualized hourly wage for the job in question; or

II. For an existing employee the cost of the changes would bring the total cost of physical changes made to accommodate the employee's handicapping conditions since the beginning of the employee's employment with the employer to greater than five percent (5%) of the employee's current salary or current annualized hourly wage; or

7. Make any changes that would impose on the employer an undue hardship, provided that the costs of less than five percent (5%) of an employee's salary or annualized wage as determined in subsection (6) above shall be presumed not to be an undue hardship.

b. With regard to a place of public accommodations, making reasonable efforts to accommodate the handicapping conditions of a handicapped person, including, but not limited to, making facilities accessible to and usable by handicapped persons, redesigning equipment, provide mechanical aids or other assistance, or using alternative accessible locations, provided that reasonable accommodations does not require efforts which would impose an undue hardship on the entity involved. (1985, c. 571, s. 1.)

CASE NOTES

Person who had eye disease but whose vision was functioning normally with glasses was not visually disabled within the meaning of § 168-1 and thus was not a "handicapped person" who was granted a right of employment by former § 168-6. Burgess v. Joseph Schlitz Brewing Co., 298 N.C. 520, 259 S.E.2d 248 (1979).

§ 168A-4. Reasonable accommodation duties.

(a) A qualified handicapped person requesting a reasonable accommodation must apprise the employer, employment agency, labor organization, or place of public accommodation of his or her handicapping condition, submit any necessary medical documentation, make suggestions for such possible accommodations as are known to such handicapped person, and cooperate in any ensuing discussion and evaluation aimed at determining possible or feasible accommodations.

(b) Once a qualified handicapped person has requested an accommodation, or if a potential accommodation is obvious in the circumstances, an employer, employment agency, labor organization or place of public accommodation shall investigate whether there are reasonable accommodations that can be made and make reasonable accommodations as defined in G.S. 168A-3(10). (1985, c. 571, s. 1.)

§ 168A-5. Discrimination in employment; exemptions.

(a) Discriminatory practices. — It is a discriminatory practice for:

(1) An employer to fail to hire or consider for employment or promotion, to discharge, or otherwise to discriminate against a qualified handicapped person on the basis of a handicapping condition with respect to compensation or the terms, conditions, or privileges of employment;

(2) An employment agency to fail or refuse to refer for employment, or otherwise to discriminate against a qualified handicapped person on the basis of a handicapping condition;

(3) A person controlling an apprenticeship, on-the-job, or other training or retraining program, to discriminate against a qualified handicapped person on the basis of a handicapping condition in admission to, or employment in, a program established to provide apprenticeship or other training; or

(4) An employer or employment agency to require an applicant to identify himself as handicapped prior to a conditional offer of employment; however, any employer may invite an applicant to identify himself as handicapped in order to act affirmatively on his behalf.

(5) An employer, labor organization, or employment agency to fail to meet the duties imposed on them by G.S. 168A-4(b).

(b) Exemptions. — It is not a discriminatory action for an employer, employment agency, or labor organization:

(1) To make an employment decision on the basis of State and federal laws or regulations imposing physical, health, mental or psychological job requirements;

(2) To fail to hire, transfer or promote, or to discharge a handicapped person who has a history of drug abuse or who is unlawfully using drugs where the job in question is in an establishment that manufactures, distributes, dispenses, conducts research, stores, sells or otherwise handles controlled substances regulated by the North Carolina Controlled Substances Act, G.S. 90-86 et seq.;

(3) To fail to hire, transfer, or promote, or to discharge a handicapped person because the person has a communicable disease which would disqualify a non-handicapped person from similar employment;

(4) To fail to make reasonable accommodations where the handicapped person has not fulfilled the duties imposed by G.S. 168A-4;

(5) To inquire whether a person has the ability to perform the duties of the job in question;

(6) To require or request a person to undergo a medical examination, which may include a medical history, for the purpose of determining the person's ability or capacity to safely and satisfactorily perform the duties of available jobs for which the person is otherwise qualified, or to aid in determining possible accommodations for a handicapping condition, provided (i) that an offer of employment has been made on the condition that the person meets the

physical and mental requirements of the job with or without reasonable accommodation; and (ii) that the examination, unless limited to determining the extent to which a person's handicapping condition would interfere with his or her ability or capacity to safely and satisfactorily perform the duties of the the job in question or the possible accommodations for a handicapping condition, is required of all persons conditionally offered employment for the same position regardless of handicapping condition;

(7) To obtain medical information or to require or request a medical examination where such information or examination is for the purpose of establishing an employee health record;

(8) To administer pre-employment tests, provided that the tests (i) measure only job-related abilities, (ii) are required of all applicants for the same position unless such tests are limited to determining the extent to which the person's handicapping condition would interfere with his or her ability to safely and satisfactorily perform the duties of the job in question or the possible accommodations for the job in question, and (iii) accurately measure the applicant's aptitude, achievement level, or whatever factors they purport to measure rather than reflecting the handicapped person's impaired sensory, manual or speaking skills except when those skills are requirements of the job in question, provided that an employer shall not be liable for improper testing which was administered by a State agency acting as an employment agency. (1985, c. 571, s. 1.)

§ 168A-6. Discrimination in public accommodations.

It is a discriminatory practice for a person to deny a qualified handicapped person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation on the basis of a handicapping condition. In the area of structural modifications, this section may be satisfied by compliance with the North Carolina Building Code. (1985, c. 571, s. 1.)

§ 168A-7. Discrimination in public service.

It is a discriminatory practice for a State department, institution, or agency, or any political subdivision of the State or any person that contracts with the above for the delivery of public services including but not limited to education, health, social services, recreation, and rehabilitation, to refuse to provide reasonable aids and adaptations necessary for a known qualified handicapped person to use or benefit from existing public services operated by such entity; provided that the aids and adaptations do not impose an undue hardship on the entity involved. (1985, c. 571, s. 1.)

§ 168A-8. Discrimination in public transportation.

It is a discriminatory practice for any transportation system providing transportation to the general public to fail to ensure access to and the benefits of public transportation to a qualified handicapped person; however, public transportation systems may use alternative methods to provide transportation for handicapped persons, as long as handicapped persons are offered transportation that, in relation to the transportation offered to other persons, is:

(1) In a similar geographic area of operation;
(2) For fares not greater in price;
(3) With similar or no restrictions as to trip purpose;
(4) With reasonable response time; and
(5) With similar hours of operations.

Nothing in this section shall apply to privately owned, local transit or transportation systems existing on October 1, 1985, or to interstate air carriers complying with federal regulations promulgated by the Civil Aeronautics Board and administered by the United States Department of Transportation. (1985, c. 571, s. 1.)

§ 168A-9. Affirmative defenses.

Any employer may assert affirmative defenses in any action brought under this Chapter. This section shall not create any inference that an employment action which is not listed as an affirmative defense is therefore, by implication, a discriminatory practice, so long as the employment action is not otherwise prohibited by this Chapter. The following is a non-exclusive list of affirmative defenses:

(1) The qualified handicapped person's failure to comply with or meet the employer's work rules and policies or performance standards, provided that such person is not held to rules or standards different from other non-handicapped employees similarly employed;
(2) The qualified handicapped person's excessive, willful or habitual tardiness or absence, provided that the standard used by the employer in determining whether such tardiness or absence is excessive is the same as that applied by the employer to non-handicapped employees similarly employed; or
(3) A bona fide seniority or merit system, or a system which measures earnings by quantity or quality of work or production, or differences in location of employment. (1985, c. 571, s. 1.)

§ 168A-10. Retaliation prohibited.

No employer shall discharge, expel, refuse to hire, or otherwise discriminate against any person or applicant for employment, nor shall any employment agency discriminate against any person, nor shall a labor organization discriminate against any member or applicant for membership because such person has opposed any practice made a discriminatory practice by this Chapter or because he has testified, assisted or participated in any manner in proceedings under this Chapter. (1985, c. 571, s. 1.)

§ 168A-11. Civil action.

(a) A handicapped person aggrieved by a discriminatory practice prohibited by G.S. 168A-5 through 168A-8, or a person aggrieved by conduct prohibited by G.S. 168A-10, may bring a civil action to enforce rights granted or protected by this Chapter against any person described in G.S. 168A-5 through 168A-8 or in G.S. 168A-10 who is alleged to have committed such practices or engaged in such conduct. The action shall be commenced in superior court in the county where the alleged discriminatory practice or prohibited conduct occurred or where the plaintiff or defendant resides. Such action shall be tried to the court without a jury.

(b) Any relief granted by the court shall be limited to declaratory and injunctive relief, including orders to hire or reinstate an aggrieved person or admit such person to a labor organization. In a civil action brought to enforce provisions of this Chapter relating to employment, the court may award back pay. Any such back pay liability shall not accrue from a date more than two years prior to the filing of an action under this Chapter. Interim earnings or amounts earnable with reasonable diligence by the aggrieved person shall operate to reduce the back pay otherwise allowable.

(c) No court shall have jurisdiction over an action filed under this Chapter where the plaintiff has commenced federal judicial or administrative proceedings under Section 503 or Section 504 of the Vocational Rehabilitation Act of 1973, 29 U.S.C. §§ 793 and 794, as amended, or federal regulations promulgated thereunder, involving or arising out of the facts and circumstances involved in the alleged discriminatory practice under this Chapter. If such proceedings are commenced after a civil action has been commenced under this Chapter, the State court's jurisdiction over the civil action shall end and the action shall be forthwith dismissed.

(d) In any civil action brought under this Chapter, the court, in its discretion, may award reasonable attorney's fees to the substantially prevailing party as part of costs. (1985, c. 571, s. 1.)

CASE NOTES

Status as Handicapped Person Essential to Cause of Action. — In order to state a cause of action for violation of the right to employment granted in former § 168-6, plaintiff was required to establish that he was a "handicapped person" to whom such rights are granted. Burgess v. Joseph Schlitz Brewing Co., 298 N.C. 520, 259 S.E.2d 248 (1979).

§ 168A-12. Statute of limitations.

A civil action brought pursuant to this Chapter shall be commenced within 180 days after the date on which the aggrieved person became aware or, with reasonable diligence, should have become aware of the alleged discriminatory practice or prohibited conduct. (1985, c. 571, s. 1.)

Supreme Court, U.S.
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No. 94-1062

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STEPHEN D. MCCULLOUGH,
Petitioner,

v.

BRANCH BANKING & TRUST COMPANY, INC.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the Fourth Circuit correctly apply the 180-day statute of limitations contained in North Carolina's Handicapped Persons Protection Act, N.C. Gen. Stat. § 168A-1, *et seq.*, to a claim brought under § 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1985)?

LIST OF ALL PARTIES

The list of all parties to this proceeding appear in the caption.

CORPORATE DISCLOSURE STATEMENT

Respondent Branch Banking & Trust Company, Inc. hereby certifies that the following is a full and complete list of all parent companies and subsidiaries (except wholly owned subsidiaries):

Branch Banking & Trust Financial Corporation, parent

Branch Banking & Trust Company, Inc., subsidiary

Nexus, Incorporated, subsidiary

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RESPONDENT'S BRIEF IN OPPOSITION

ALL REPORTS OF OPINIONS

The Magistrate Judge's Memorandum & Recommendation recommending dismissal due to untimeliness is unreported, as is the district court's opinion refusing to adopt that portion of the Magistrate Judge's Memorandum & Recommendation. The Magistrate Judge's Memorandum & Recommendation recommending that summary judgment be granted in favor of BB&T is unreported. The district court's decision granting summary judgment is reported at 844 F. Supp. 258 (E.D.N.C. 1993). The Fourth Circuit's opinion affirming the grant of summary judgment on other grounds is reported at 35 F.3d 127 (4th Cir. 1994).

TEXT OF RELEVANT STATUTES

Relevant provisions of North Carolina's Handicapped Persons Protection Act, N.C. Gen. Stat. §§ 168A-1, *et seq.*, are as follows:

"The purpose of this Chapter is to encourage and enable all handicapped people to participate fully to the maximum extent of their abilities in the social and economic life of the State, to engage in remunerative employment, to use available public accommodations and public services, and to otherwise pursue their rights and privileges as inhabitants of this state." N.C. Gen. Stat. § 168A-2(a).

"No court shall have jurisdiction over an action filed under this Chapter where the plaintiff has commenced federal judicial or administrative proceedings under section 503 or section 504 of the Vocational Rehabilitation Act of 1973, 29 U.S.C. §§ 793 and 794, as amended, or federal regulations promulgated thereunder, involving or arising out of the facts and circumstances involved in the alleged discriminatory practice under this Chapter. If such proceedings are commenced after a civil action has been commenced under this Chapter, the State court's jurisdiction over the civil action shall end and the action shall be forthwith dismissed." N.C. Gen. Stat. § 168A-11(c).

"A civil action brought pursuant to this Chapter shall be commenced within 180 days after the date on which the aggrieved person became aware or, with reasonable diligence, should have become aware of the alleged discriminatory practice or prohibited conduct." N.C. Gen. Stat. § 168A-12.

Relevant portions of the Americans With Disabilities Act, 42 U.S.C. §§ 12101, *et seq.*, are as follows:

"The powers, remedies, and procedures set forth in sections 705, 706, 707, 709 and 710 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9) shall

be the powers, remedies, and procedures this title provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116, concerning employment." 42 U.S.C. § 12117(a).

Relevant portions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, are as follows:

"A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful practice has occurred. . . ." 42 U.S.C. § 2000e-5(e)(1) (§ 706 of Title VII).

N.C. Gen. Stat. § 1-52 provides as follows:

Within three years an action —

. . .

(5) For criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated.

STATEMENT OF THE CASE

Petitioner Stephen D. McCullough's (hereafter "McCullough") first full-time employer following his graduation from college in 1978 was First Union National Bank. In 1983, McCullough was involved in an automobile accident in which a pedestrian was injured. McCullough was convicted of felonious hit and run with personal injury and driving under the influence, and was subsequently discharged by First Union.

In 1986 McCullough applied for employment with Respondent Branch Banking & Trust Company, Inc. (hereafter "BB&T"). In his interviews, McCullough explained the circumstances of the 1983 accident which led to his termination from First Union, but did not mention any of his previous arrests. Despite McCullough's history, BB&T hired him effective June 30, 1986, as a Liability Management Specialist. McCullough's immediate

superior while he was employed by BB&T was Rodney Hughes; Hughes reported to Scott Reed, Senior Executive Vice President, Chief Financial Officer.

At the time that McCullough was hired by BB&T, he was using marijuana regularly and was also drinking alcohol approximately five nights per week. McCullough continued to use marijuana regularly, until October 1990, and also continued to use alcohol regularly, through at least March 1, 1991, the day he was informed he was being suspended from employment.

Due to his continued use of alcohol, McCullough occasionally arrived at work with a hangover or arrived at work late. McCullough was counselled both verbally and in writing during 1987 and 1988 for these problems.

McCullough's alcohol-related arrests also continued after he was hired by BB&T. In 1986 and 1987, McCullough was charged twice with public intoxication in Horry County, South Carolina. On August 11, 1987, McCullough was arrested in Wake County, North Carolina, and was charged with Driving While Impaired ("DWI"); he was found not guilty. McCullough did not inform BB&T of this arrest.

One month later, on September 20, 1987, McCullough was arrested by Durham County authorities and charged with DWI. Before the Durham County charge was resolved, McCullough was arrested again, this time in Wilson County on December 4, 1987, and was charged with DWI and Driving With License Revoked ("DWLR"). McCullough was convicted of DWI in both the Durham and Wilson County arrests. As a result, McCullough was sentenced to serve, and did in fact serve, seven days in jail. McCullough did not tell BB&T about these arrests or about the time he spent in jail.

BB&T learned of the Wilson County arrest when a BB&T employee read about it in The Wilson Daily Times. As a result, Hughes met with McCullough and told him that "counselling

was available and while [McCullough's] participation in that counselling was not required, 'further incidences of alcohol/ drug abuse would not be tolerated at BB&T and would result in [McCullough's] termination.'" Hughes also asked McCullough to meet with BB&T's then-Human Resources Development Manager, Whit Strunk, about the possibility of counselling for alcohol problems. Although McCullough met with Strunk, he did not follow Strunk's suggestion that he obtain an assessment at Charter North Ridge alcohol treatment center.

On October 20, 1990, McCullough was again arrested and charged with DWI and Driving With License Permanently Revoked ("DWLPR"). In connection with these charges, McCullough appeared for a hearing at the Department of Motor Vehicles ("DMV") in February 1991. While standing in the hall outside the hearing room, McCullough's then-counsel made the statement that McCullough had been living in Florida for the past three years. McCullough testified that the attorney intended this statement to be overheard by the traffic policeman, Horace Macon, because he felt it might be helpful to shed some doubt on McCullough's residence. Later, at the hearing, McCullough told the DMV hearing officer that he lived at a Florida address, even though he had been living in North Carolina at all times since 1986.

As a direct result of these events, Horace Macon contacted Billy Montague, then-Human Resources Director for BB&T, on February 12, 1991, in an attempt to verify McCullough's employment and residence in North Carolina. Macon reported the events of the hearing. In response, BB&T undertook an investigation into McCullough's criminal record. This investigation showed various arrests of which BB&T had previously been unaware, and showed that McCullough's North Carolina driver's license had been revoked.

Following this investigation, on March 1, 1991, McCullough was placed on a leave of absence without pay. McCullough's

employment with BB&T was terminated effective March 13, 1991, for loss of confidence resulting from McCullough's lies to his superiors and failure to provide relevant information concerning his employment.

McCullough filed his Complaint alleging a violation of § 504 of the Rehabilitation Act, 29 U.S.C. § 794, on May 28, 1992, *442 days after the date that he alleged he was wrongfully discharged.*

BB&T filed a Motion to Dismiss, which sought, among other things, dismissal of McCullough's § 504 claim on the ground that it was barred by the 180-day statute of limitations set forth in the North Carolina Handicapped Persons Protection Act, N.C. Gen. Stat. §§ 168A-1, *et seq.* (hereafter the "N.C. Act").

The Magistrate Judge recommended, *inter alia*, that McCullough's § 504 claim be dismissed as untimely. The district court, however, disagreed, holding instead that the most appropriate North Carolina statute of limitations for a § 504 claim was the three-year statute of limitations for personal injury claims set forth in N.C. Gen. Stat. § 1-52(5).

Following the conclusion of discovery, BB&T moved for summary judgment on all remaining counts. With respect to McCullough's § 504 claim, BB&T argued, among other things, that it was not a recipient of federal financial assistance and therefore not subject to § 504. The Magistrate Judge recommended that summary judgment in favor of BB&T be granted on all counts, finding with respect to the § 504 claim that the receipt of SBA guaranteed loan funds does not constitute receipt of federal financial assistance. The district court adopted the Memorandum and Recommendation with respect to the Magistrate Judge's determination that BB&T was not a recipient of federal financial assistance; on this basis, the district court granted summary judgment in favor of BB&T on McCullough's § 504 claim. The district court dismissed McCullough's two state law claims without prejudice.

On appeal, the Fourth Circuit did not address the district court's determination that BB&T was not a recipient of federal funds, but affirmed the dismissal on the alternate ground that the claim was barred by the 180-day statute of limitations contained in the N.C. Act.

BASIS FOR JURISDICTION BELOW

Jurisdiction was proper in the Fourth Circuit pursuant to 28 U.S.C. § 1291, as the case was on appeal from a final decision of the United States District Court, Eastern District of North Carolina. Jurisdiction was proper in the district court with respect to McCullough's claim under § 504 of the Rehabilitation Act pursuant to 28 U.S.C. § 1331, as this claim involved the interpretation of laws of the United States.

ARGUMENT

I. McCullough's Petition for Certiorari Should Be Denied.

Rule 10 of the Rules of the Supreme Court of the United States sets forth the circumstances under which certiorari will be granted. The only provisions which apply to review of decisions by circuit courts of appeal are as follows:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter . . . or has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision.
>
> . . . .
>
> (c) When . . . a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Because none of the above circumstances exist in the present case, and because no other reasons have been advanced to justify review by this Court, McCullough's Petition for Certiorari should be denied.

A. The Timeliness Issue Presented Herein Is Not An Important Question Which Should Be Settled By This Court, Nor Does The Fourth Circuit's Decision Conflict With Applicable Decisions Of This Court.

The Rehabilitation Act of 1973 does not provide a statute of limitations for claims brought pursuant to § 504. This Court, however, has already considered the appropriate steps to take in

cases where federal statutes without limitations periods are at issue. In such cases, federal courts must "adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so." *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985). This Court has also set forth a framework to determine *which* state statute of limitations to use; specifically, this Court has concluded "that Congress intended that the courts apply the *most closely analogous statute of limitations under state law.*" *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983) (emphasis supplied). As noted by the Fourth Circuit below, this process involves a two-pronged analysis:

> [T]he court should first select the state statute "most analogous" to the federal claim. The court should then consider whether application of that limitations period is consistent with the federal statute and its underlying policies.

McCullough, 35 F.3d at 129.

Here, the Fourth Circuit determined that the N.C. Act was the state statute most analogous to the federal Rehabilitation Act, and therefore applied the 180-day statute of limitations contained therein to McCullough's § 504 claim. This decision does not constitute an "important question of federal law which has not been, but should be, settled by this Court." As noted above, the framework for selecting limitations periods for claims under federal statutes lacking timeliness rules has already been set forth by this Court. While McCullough apparently disagrees with the specific state statute of limitations selected by the Fourth Circuit, this does not, in and of itself, compel the grant of certiorari. In fact, should this Court review all cases in which a party disagrees with the state statute of limitations applied by a federal court to a particular federal statute, its docket would likely consist of nothing else. The fact remains that the Fourth Circuit meticulously applied the guidelines set forth by this

Court to select the state statute of limitations most analogous to McCullough's § 504 claim.

Nor is review appropriate on the grounds that the Fourth Circuit's decision somehow "conflicts with applicable decisions of this Court." Again, the standards and lessons of *Wilson* were carefully analyzed and applied by the Fourth Circuit below. As is discussed in detail in the sections immediately following, the Fourth Circuit clearly followed *Wilson* when it correctly determined that the N.C. Act's statute of limitations should be applied to McCullough's claims.

1. The 180-Day Limitation In N.C. Gen. Stat. § 168A-12 Is The Most Analogous State Statute Of Limitations

Under *Wilson*, the first inquiry is which North Carolina statute is most analogous to the Rehabilitation Act. *McCullough*, 35 F.3d at 129. Here, the N.C. Act, which contains a 180-day statute of limitations, is clearly the most analogous state statute. Like the Rehabilitation Act, the N.C. Act specifically addresses employment discrimination on the basis of handicap or disability. N.C. Gen. Stat. § 168A-5. The N.C. Act also proscribes handicap discrimination in other areas, such as public accommodations, services and transportation. N.C. Gen. Stat. §§ 168A-6 - 8. Moreover, the N.C. Act prohibits discrimination by both private and public employers, as well as by labor organizations and individuals or entities who control training programs. N.C. Gen. Stat. § 168A-5(a). Thus, the N.C. Act clearly provides a *comprehensive prohibition against discrimination on the basis of handicap*. Furthermore, both the N.C. Act and the Rehabilitation Act permit the direct filing of a civil lawsuit. N.C. Gen. Stat. § 168A-11(a). Thus, the N.C. Act provides parallel redress to the very same class of aggrieved persons in the same manner as does the Rehabilitation Act.

In a recent Virginia case brought pursuant to § 504 of the Rehabilitation Act, the Fourth Circuit applied the statute of limitations found in a Virginia state statute prohibiting handicap discrimination. In *Wolsky v. Medical College of Hampton Rds.*, 1 F.3d 222 (4th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 881 (1994), the Fourth Circuit applied the one-year statute of limitations set forth in the Virginia Rights of Persons with Disabilities Act, Va. Code Ann. §§ 51.5-40, *et seq.*, to a § 504 case. The court held that, because the Virginia Act specifically redressed discrimination on the basis of handicap and was patterned after the Rehabilitation Act, the Virginia Act was "the most analogous statute, and its statute of limitations is applicable." *Wolsky*, 1 F.3d at 225. *See also Eastman v. Virginia Polytechnic Inst. and State Univ.*, 732 F. Supp. 665 (W.D. Va. 1990), *aff'd on other grounds*, 939 F.2d 204 (4th Cir. 1991) (district court found that the one-year statute of limitations contained in the Virginia Act was the "most analogous" state statute of limitations); *Carrozza v. Howard County*, 847 F. Supp. 365 (D. Md. 1994) (holding that the proper limitations period for the plaintiff's Rehabilitation Act claim is the six-month period provided in Md. Ann. Code art. 49B, § 9A, which applies to, *inter alia*, claims for disability discrimination in employment).

On the other hand, the North Carolina general three-year statute of limitations for personal injuries (N.C. Gen. Stat. § 1-52(5)), advanced by McCullough as the most analogous state statute of limitations, is not appropriate. As the Fourth Circuit noted in its opinion below, the general wrongful discharge statute to which the personal injury statute of limitations has been applied "protects against a wide range of discrimination which, although including persons with disabilities, also encompasses many other classes of individuals." *McCullough*, 35 F.3d at 132.

The fact that the N.C. Act and the Rehabilitation Act are not identical does not require the use of yet another statute of

limitations. The reasoning which compels the conclusion that the N.C. Act's 180-day statute of limitations is the most analogous state statute can best be set forth by quoting the Fourth Circuit's astute analysis:

> The differences between the North Carolina Act and the Rehabilitation Act identified by McCullough do not, by themselves, magically tip the balance of similarities so as to make the general wrongful discharge provision more analogous to the Rehabilitation Act than the specific provisions of the North Carolina Act. It simply means that, in North Carolina, there is no perfect counterpart to the Rehabilitation Act, and we must determine which statute is more appropriate. To make this determination, we must look at both statutes in their entirety to ascertain which North Carolina law is most similar to the cause of action provided under the Rehabilitation Act. For example, in *Wilson*, 471 U.S. at 272-75, the Court considered the underlying causes of action created by 42 U.S.C. § 1983 (1988) and determined that, because such a broad variety of claims could be asserted under § 1983, it was more analogous to a general cause of action. Since all § 1983 actions involve alleged injuries to the personal civil rights of the claimants, the Court concluded that the cause of action can best be characterized as one for personal injury. *Id.* at 277-78. In *Wolsky*, 1 F.3d at 223, we reasoned that the Rehabilitation Act was not a general provision such as § 1983, but a more specifically tailored statute intended to redress discrimination against a refined class of individuals. We therefore concluded that the underlying cause of action of the Rehabilitation Act was more similar to the specific provisions of the Virginia Act, which also redressed discrimination against disabled individuals, than it was to the general personal injury provisions under Virginia law. . . . [Here,] because the Rehabilitation Act is a specific statute directed at protecting one class of persons, the specific North Carolina

> Act is more analogous to McCullough's claim than a general wrongful discharge statute.

McCullough, 35 F.3d at 132.

In sum, both the N.C. Act and § 504 have as their primary and specific purpose the elimination of arbitrary discrimination against a specific class of persons: otherwise qualified disabled individuals. Both statutes provide for parallel equitable remedies should the claimant succeed in proving intentional discrimination. Neither statute contains an administrative, charge-filing requirement, but both permit direct filing of a civil lawsuit. Clearly, the N.C. Act's 180-day statute of limitations is the most appropriate state statute of limitations.

2. Application Of A 180-Day Statute Of Limitations Does Not Violate Federal Law Or Policy.

Under the second prong of the analysis set forth in *Wilson*, it is necessary to determine whether application of the 180-day statute of limitations is consistent with the federal Rehabilitation Act and its underlying policies. *McCullough*, 35 F.3d at 131. Contrary to McCullough's claims, such application does not conflict with federal law or policy. To begin with, it is absurd to suggest that application of a 180-day statute of limitations to a handicap discrimination claim is somehow in and of itself inconsistent with federal policy. *Congress itself has approved such a limitations period* by enacting the Americans With Disabilities Act, 42 U.S.C. §§ 12101, *et seq.* (the "ADA"). The ADA requires that claimants file a charge of discrimination with the Equal Employment Opportunity Commission within 180 days of the alleged discriminatory action. *See* 42 U.S.C. § 12117(a); 42 U.S.C. § 2000e-5(e)(1). (McCullough's Petition erroneously claims that the ADA is "silent in regard to a limitations period." *Petition* at 34.) This Court has held that the charge filing requirement is akin to a statute of limitations. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). Signifi-

cantly, the ADA and the Rehabilitation Act are similar in purpose and scope, as both are designed to assist otherwise qualified disabled persons with employment opportunities. Clearly, the application of a 180-day statute of limitations to the Rehabilitation Act would not violate federal policy and interests where Congress has expressly established such a limitation in a strikingly similar statute.

Nor is the ADA the only 180-day statute of limitations approved by Congress. The Civil Rights Act of 1964, which, like the Rehabilitation Act, was enacted to assure employment opportunities to certain qualified individuals, contains a 180-day charge filing requirement. 42 U.S.C. § 2000e-5(e)(1). Similarly, in *DelCostello*, 462 U.S. 151, 172, this Court held that the six-month statute of limitations set forth in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), should be applied to an employee's suit against an employer and a union, alleging the employer's breach of a collective-bargaining agreement and the union's breach of its duty of fair representation.[1]

McCullough's primary argument concerning this step of the analysis, however, is that the 180-day statute of limitations contained in the N.C. Act is inappropriate because the N.C. Act somehow violates the federal constitution by "forc[ing] an aggrieved person to choose between the pursuit of his/her rights under either" the N.C. Act or the Rehabilitation Act. McCullough does not explain, however, precisely *how* the application of the

---

[1] Interestingly, this Court in *DelCostello* held that, under certain circumstances, application of a *state* limitations period may be inappropriate; in such circumstances, the Court held, "timeliness rules drawn from federal law" may be used. *Id.*, 462 U.S. at 162. Should such an analysis be applied to the instant case, a 180-day statute of limitations would still be the most appropriate: surely, the timeliness rule set forth by Congress in the ADA, which specifically proscribes disability discrimination, would be an appropriate measure for a Rehabilitation Act claim.

N.C. Act's *statute of limitations* forces a potential plaintiff to make such a choice. While § 168A-11(c) of the N.C. Act requires that the state action be terminated if a federal cause of action is initiated, it does so *without regard* to the length of the statute of limitations applied to a federal claim. Thus, whether a 180-day limitations period, or a ten-year limitations period, is applied, § 168A-11(c) dictates that the state court cause of action be terminated upon the filing of a federal claim. In essence, to the extent that § 168A-11(c) requires a plaintiff to make a choice, application of the 180-day limitations period simply requires a plaintiff to make the choice sooner.

Moreover, it is ridiculous to suggest that § 168A-11(c) *violates the Constitution*[2] by refusing to allow the state's limited resources to be used to pursue duplicative remedies for rights fully vindicated under federal law. Although McCullough argues strenuously to the contrary, *the N.C. Act does not in any way require a putative plaintiff to forfeit his or her rights under the Rehabilitation Act.* The statute merely provides that a plaintiff who chooses to pursue federal remedies identical to or greater than those provided by the state should not be permitted to waste state resources by maintaining duplicative lawsuits in both forums.

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[2] In his Petition, McCullough appears to make such an argument. McCullough, however, has never before raised the issue of the constitutionality of N.C. Gen Stat. § 168A-11(c), either before the district court or before the Fourth Circuit.

In his reply brief to the Fourth Circuit, McCullough does state that if a 180-day statute of limitations is applied, N.C. Gen. Stat. § 168A-11(c) is inconsistent with the Constitution. To the extent that McCullough is arguing that *the N.C. Act itself* is unconstitutional, that argument is not before this Court. Generally, arguments not raised at the trial or appellate court level will not be reviewed on petition for certiorari to the Supreme Court absent exceptional circumstances. *See United States v. Lovasco*, 431 U.S. 783, 788 n.7, *reh'g denied* 434 U.S. 881 (1977); *Miree v. DeKalb County*, 433 U.S. 25, 33 (1977); *Tennessee v. Dunlap*, 426 U.S. 312, 316 n.3 (1976); *United States v. Estate of Donnelly*, 397 U.S. 286, 295 n.5 (1970).

It is significant that there is no federal law that requires (or even encourages) a state to provide remedies for discrimination on the basis of handicap or disability. The N.C. Act does not *limit* McCullough's options, but expands them: in the absence of this statute, McCullough would have only one option with which to pursue his claims of discrimination. Because federal law or policy does not require a state to provide remedies for handicap discrimination, a state statute which provides such remedies in the event a plaintiff cannot or does not avail himself of federal remedies should not be considered unconstitutional merely because it casts its cause of action in the alternative to federal law.

B. The Circuits Are Not In Conflict.

While other circuits have applied personal injury statutes of limitations to actions under § 504, *see, e.g.*, *Hickey v. Irving Indep. School Dist.*, 976 F.2d 980 (5th Cir. 1992); *Morse v. University of Vermont*, 973 F.2d 122 (2nd Cir. 1992); and *Hall v. Knott County Bd. of Educ.*, 941 F.2d 402 (6th Cir.), *cert. denied*, __ U.S. __, 112 S. Ct. 982 (1992), these cases do not conflict with the instant case. In *Morse* and *Hall*, the respective states *had not enacted statutes proscribing disability discrimination*. Therefore, those courts were unable to even consider the application of a statute of limitations from a state handicap discrimination statute. *Wolsky*, 1 F.3d at 224. In *Hickey*, while the state (Texas) had enacted a statute prohibiting disability discrimination, *that statute contained no limitations period*; therefore, again, the court of appeals was forced to apply another statute of limitations. *Wolsky*, 1 F.3d at 224.

Indeed, in *Wilson v. Garcia*, one of the principal reasons why this Court applied the state statute of limitations for tort actions to federal cases brought pursuant to § 1983 was that there was essentially *no analogous state statute* in such cases. As this Court noted in *Wilson*:

> [Section] 1983 provides a "uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." The high purposes of this unique remedy make it appropriate to accord the statute "a sweep as broad as its language." Because the § 1983 remedy is one that can "override certain kinds of state laws," and is in all events, "supplementary to any remedy any State might have," *it can have no precise counterpart in state law.*

Wilson, 471 U.S. at 271-72 (emphasis supplied) (citations and footnotes omitted). Thus, the unique nature of a § 1983 remedy necessarily determined that there was no analogous state counterpart.

In this case (and in *Wolsky*), however, the relevant states enacted statutes that prohibit disability discrimination and are similar to the Rehabilitation Act. These state counterparts are clearly the most analogous state statutes of limitations. Thus, the "ostensible" conflict asserted by McCullough in his Petition is not present. *Indeed, this Court has previously denied certiorari on this precise issue. See Wolsky*, 1 F.3d 222. In short, because the decisions of other circuits are distinguishable on their facts, there is no conflict which the Court needs to resolve.

II. Because McCullough Is Represented By Counsel, McCullough's *Pro Se* Petition For Writ Of Certiorari Is Improperly Filed And Should Not Be Considered.

At all times relevant to this lawsuit, McCullough has been represented by an attorney, Robert J. Willis. As of the filing of this Petition, Mr. Willis has not submitted a Motion to Withdraw, nor has Mr. Willis notified any court in any manner of

McCullough's intention to proceed in this action *pro se*.[3] Local Rule 2.07, E.D.N.C., provides that "[N]o attorney whose appearance has been entered shall withdraw his or her appearance or have it stricken from the record except with leave of the Court." Thus, as of the time of the filing of this Petition, Mr. Willis apparently remained counsel of record for McCullough. Accordingly, because McCullough is represented by counsel and said counsel did not prepare or sign the Petition, McCullough's *pro se* Petition is improper and should not be considered by the Court.

Under 28 U.S.C. § 1654, parties may appear and conduct their cases personally or by counsel. Courts, however, have consistently held that the right to proceed *pro se* and the right to proceed by counsel exist *in the alternative*. *See, e.g., United States v. LaChance*, 817 F.2d 1491, 1498, *cert. denied*, 484 U.S 928 (1987) (right to counsel and right to proceed *pro se* exist in the alternative); *United States v. Norris*, 780 F.2d 1207, 1211 (5th Cir. 1986) (same); *O'Reilly v. New York Times Co.*, 692 F.2d 863, 868 (2nd Cir. 1982) (party must discharge attorney before appearing *pro se*); *Frank M. McDermott, Ltd. v. Moretz*, 898 F.2d 418, 422 (4th Cir. 1990) ("[i]n order for the [the defendant] to have proceeded *pro se* he must have immediately discharged the other attorneys who had filed appearances on his behalf.") (citing *O'Reilly*, 692 F.2d at 868).

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[3] It is not entirely clear whether McCullough is still represented by Mr. Willis in this matter. McCullough filed this Petition *pro se*, claiming only that Mr. Willis was unable to pay timely and proper attention to the Petition due to his crowded trial calendar. *Petition* at 12. In correspondence to BB&T's counsel, Mr. Willis has stated that "[his] representation of McCullough in this matter ended when a final judgment for costs was entered by the federal court," presumably referring to the Fourth Circuit's judgment and mandate. Mr. Willis also indicated that he still represents McCullough in conjunction with McCullough's parallel lawsuit against BB&T in state court.

Because Mr. Willis has not withdrawn from this case, under the local rules for the Eastern District of North Carolina and the law of the Fourth Circuit, Mr. Willis remains counsel of record for McCullough. Accordingly, McCullough's *pro se* Petition was improperly filed and should not be considered by this Court.[4]

CONCLUSION

For all of the foregoing reasons, this Court should deny McCullough's Petition for Writ of Certiorari.

Respectfully submitted,

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[4] Additionally, Sup. Ct. R. 33.2 states that every document submitted to the Court must bear "the name of the member of the Bar of this Court *who is counsel of record for the party concerned* . . . " (emphasis supplied). McCullough has not complied with this rule because his Petition does not have the name of his counsel of record, Mr. Willis. Moreover, because McCullough is represented by counsel of record, the certificate of service submitted by McCullough is defective inasmuch as it was not signed by ". . . a member of the Bar of this Court representing the party on whose behalf service is made." *See* Sup. Ct. R. 29.5(b).

(3)

Supreme Court, U.S.
FILED
JAN 20 1995
OFFICE OF THE CLERK

No. 94-1062

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1994

Stephen D. McCullough,

Petitioner

v.

Branch Banking & Trust Company, Inc.,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY MEMORANDUM

by Stephen D. McCullough, pro se

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PETITIONER'S REPLY MEMORANDUM

REASONS FOR GRANTING THE PETITION

I. The Decision of the Court of Appeals is Erroneous and in Distinct Conflict with the Principles in the U.S. Supreme Court's Decision in the case of Wilson v. Garcia, 471 U.S. 261, (1985).

Both the Fourth Circuit and the Respondent rewrite the principal admonition of 42 U.S.C §1988; that limitation periods of state statutes are properly applied to federal civil rights actions only when the state statute from which the limitations period is borrowed **"is not inconsistent with the Constitution and laws of the United States."** The Respondent accurately quotes the Fourth Circuit's interpretation of that admonition as

> [T]he court should then consider whether application of that limitations period

> is consistent with the federal statute and its underlying policies.

McCullough, 35 F.3d at 129 and Respondent's Brief in Opposition at page 9. Also,

> [W]e now consider whether application of the 180-day statute of limitations contained within the North Carolina (Handicapped Persons Protection) Act is consistent with the federal policies underlying the Rehabilitation Act.

McCullough, 35 F.3d at 131 **misquoting** Wilson, at 266-67 ("When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law **if it is not inconsistent with federal law or policy**

to do so"). It is this misinterpretation which lies at the heart of this appeal. The instruction in 42 U.S.C §1988 does **not** impose upon a court an obligation to analyze whether the application of a limitations period from a state statute is consistent with the federal statute and its underlying policies. Instead, 42 U.S.C. §1988 requires a court to ensure that the statute from which the limitations period is borrowed "is not inconsistent with the Constitution and laws of the United States." Wilson, at 267 citing Burnett v. Grattan, 468 U.S. 42, 47-48. A review of the record will clearly reveal that Petitioner has argued in the courts below as he argues now; that application of the 180-day statute of limitations found at N.C. Gen. Stat. §168A-12 to a federal Rehabilitation Act claim brought pursuant to 29 U.S.C §794 is inconsistent with

the command in Amdt. §1, U.S. Const. that "No State shall make or enforce any law which shall **abridge** the privileges or immunities of citizens of the United States" (emphasis added) given the forfeiture provision of N.C. Gen. Stat. §168A-11(c) written out verbatim both in the opinion of the Fourth Circuit, McCullough, 35 F.3d at 129, and by Respondent in its Brief in Opposition at page 2.

It is ridiculous to suggest that application of the 180-day statute of limitations in the North Carolina Handicapped Persons Protection Act to federal Rehabilitation Act claims is consistent with the Constitution of the United States only because it does not completely deny a putative plaintiff the right to proceed with a cause of action under 29 U.S.C. §794. The Constitution's requirement is that the

privileges and immunities of citizens of the United States shall not be abridged. Those rights are "abridged" when the application of an identical limitations period forces a putative plaintiff to choose between vindication of his federal or his state civil rights when the definitions and procedures applicable to those rights differ.

Moreover, "The Constitution's command is that all 'persons' shall be accorded the full privileges of citizenship." Wilson, at 277. And Amdt. 14 §1, U.S. Const. clearly establishes that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." As such, citizens are clearly entitled to the privileges and immunities enacted by the State wherein they reside as well as those enacted at the federal

level.

In addition, it is absurd to suggest that applying a limitations period which does **not** vindicate the forfeiture provision enacted at N.C. Gen. Stat. §168A-11(c) requires the limited resources of the courts to be inefficiently employed. But for that forfeiture provision, 28 U.S.C. §1367(c) allows the courts to invoke pendent jurisdiction.

Respondent notes that, in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), the Court held that "timeliness rules drawn from federal law" may be used under "certain circumstances" as a "closely circumscribed" (see Reed v. United Transp. Union, 488 U.S. 319, 324 (1989)) exception to the procedure dictated by 42 U.S.C. §1988. DelCostello involved an alleged breach of a collective

bargaining agreement and an alleged breach of a union's duty of fair representation, and the "certain circumstance" causing the invocation of timeliness rules from federal law was that the plaintiff's cause of action "ha(d) no close analogy in ordinary state law." DelCostello, 462 U.S. at 151. Given the long history of courts' characterization of federal civil rights actions generally and of Rehabilitation Act claims specifically as claims involving injury to persons as noted both in the original petition and by the Fourth Circuit in the decision being appealed, that "certain circumstance" does not exist in the instant case. And contrary to Respondent's assertion at page 16 of its Brief in Opposition that the Wilson Court held that "there was essentially no analogous state statute" to federal cases brought

pursuant to §1983, the Wilson decision "principally involve(d) the second step of the process: the selection of 'the most appropriate,' or 'the most analogous' state statute of limitations to apply to this §1983 claim." Wilson, at 268. In addition, Petitioner notes that this Court recently granted certiorari in the case of Steelworkers v. Crown Cork & Seal, U.S. Supreme Court Case No. 94-835, in an appeal which will undoubtedly seek to clarify and to narrowly define the "certain circumstances" under which a court may depart from the 42 U.S.C. §1988 procedure pursuant to the holding of the DelCostello Court. In any event, it is certain that the courts are not and will not be endowed with authority to borrow **any** limitations period in a manner that is inconsistent with the Constitution and laws of the United

States.

Finally, Respondent notes that this Court recently denied certiorari in the case of Wolsky v. Medical College of Hampton Roads, 1 F.3d 222 (4th Cir.) cert. denied, ___ U.S. ____, 114 S.Ct 881 (1994). It is important, however, that this Court distinguish the Wolsky case from the Fourth Circuit's decision in the instant case. Wolsky clearly did not involve the constitutional issues raised in this appeal, because the Virginia Rights of Persons with Disabilities Act, Va. Code Ann. §§51.5-40 et. seq., does not contain a forfeiture provision in any way similar to N.C. Gen. Stat. §168A-11(c).

II. The Case is Important

Because the Fourth Circuit took

specific note of the forfeiture provision set forth in N.C. Gen. Stat. §168A-11(c), because they rewrite the requirements of 42 U.S.C. §1988, and because they fail to recognize the predominance of the federal interest in the borrowing process, this case is important to all federal civil rights litigants for all the same reasons that the decision being appealed is erroneous.

III. The Petition For A Writ Of Certiorari Was Properly Filed.

In its Brief in Opposition, Respondent claims that "at all times relevant to this lawsuit, McCullough has been represented by an attorney, Robert J. Willis." As support for this patently false assertion, Respondent cites only "Local Rule 2.07, Eastern

District of North Carolina," which would require leave of the federal district court if an attorney whose appearance had been entered in that court sought to withdraw his appearance as counsel for a litigant still proceeding in that court or if that attorney sought to have his appearance stricken from the record. But Respondent fails to acknowledge that this petition represents an appeal from a decision of the United States **Fourth Circuit** Court of Appeals as opposed to an appeal from the United States District Court for the Eastern District of North Carolina. In fact, the federal district court ruled in petitioner's favor on the Question Presented in this appeal.

Respondent cites no rule from the Fourth Circuit indicative of an assumption that counsel of record for a litigant proceeding in that court

automatically continues as counsel for that litigant if the litigant wishes to petition this Court for a Writ of Certiorari, because no such rule exists. The fact is that Petitioner has never been represented by counsel in connection with this appeal.

Respondent's argument that this petition is "improperly filed" is a blatant attempt to deny a citizen of the United States access to this Court. My petition was properly filed pro se. The certificates of service I have filed are properly drafted in declaratory form and notarized. This Reply is properly filed pro se, and my plea which immediately follows herein is properly made pro se.

It is the very actions of Respondent which form the basis of the litigation underlying this appeal that have depleted my financial resources to the point

where I am able to afford neither professional legal representation nor professional printing services in connection with this petition. My plea to this Court is for nothing more nor less than full and fair consideration.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the original petition, the Petition for a Writ of Certiorari should be granted or, alternatively, this Court should summarily reverse the decision of the United States Court of Appeals for the Fourth Circuit and remand the case for further proceedings.

Respectfully Submitted,

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